Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KUMAL BURTON,

Petitioner

-v-

PAUL RENICO, Warden

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Kumal Burton was convicted of first degree murder and felony firearm in a killing committed in a bar parking lot, based on testimony from two identifying witnesses who first told police they would not be able to identify anyone, and where most of the witnesses could not identify Petitioner. He was sentenced to life and two years in prison. Habeas Corpus was denied, and the Sixth Circuit affirmed and denied rehearing. The questions presented are:

QUESTION 1: WHETHER THE RIGHT TO COUNSEL AND DUE PROCESS WERE DENIED WHERE THE COURT SET A QUICK TRIAL DATE, THE RETAINED ATTORNEY NEEDED TIME TO PREPARE AND REQUESTED AN ADJOURNMENT, WHICH THE TRIAL COURT DENIED, CAUSING THE ATTORNEY TO WITHDRAW FROM THE CASE. ONCE THE ATTORNEY WAS OFF THE CASE, THE COURT NO LONGER NEEDED A QUICK TRIAL, AND POSTPONED THE TRIAL DATE FOR MONTHS, BUT BY THEN IT WAS TOO LATE TO GET THE ATTORNEY BACK.

QUESTION 2: WHETHER THE SIXTH CIRCUIT PANEL CAN DECLINE TO FOLLOW ANOTHER SIXTH CIRCUIT PANEL DECISION, WITHOUT FINDING ANY INTERVENING UNITED STATES SUPREME COURT OR SIXTH CIRCUIT EN BANC DECISION OVERRULING THE EARLIER CASE.

QUESTION 3: WHETHER THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WAS DENIED WHERE APPELLATE COUNSEL FAILED TO RAISE NUMEROUS MERITORIOUS ISSUES, AND RAISED POOR ISSUES INSTEAD.

QUESTION 4: WHETHER A STATE COURT RULING OF NO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CAN BE SUSTAINED WHERE THE STATE JUDGE'S SOLE REASON FOR FINDING NO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS THAT SUCH A FINDING WOULD PERMIT DEFENDANTS TO AVOID THE OPERATION OF MICHIGAN COURT RULES DESIGNED TO PREVENT SECOND APPEALS.

QUESTION 5: WHETHER THE FEDERAL COURT FINDING OF NO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS PROPER WHERE IT MAKES ASSUMPTIONS THAT COUNSEL DID RESEARCH, CONSIDERED ISSUES, AND REJECTED THEM FOR TACTICAL REASONS, WITHOUT HOLDING ANY HEARING TO DETERMINE WHETHER THESE SPECULATIONS WERE ACTUALLY TRUE.

QUESTION 6: WHETHER AN ATTORNEY CAN BE FOUND TO HAVE PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE, THROUGH INADVERTENCE, NOT READING THE RECORD, UNFAMILIARITY WITH CONTROLLING CASE LAW, OR SOME OTHER REASON DID NOT MAKE A PROFESSIONAL JUDGMENT ON AN ISSUE.

QUESTION 7: WHETHER AN ISSUE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS BARRED FROM CONSIDERATION IN HABEAS CORPUS SIMPLY BECAUSE THE ATTORNEY, IN HIS BRIEF, FAILED TO ACCUSE HIMSELF OF INEFFECTIVE ASSISTANCE OF COUNSEL.

QUESTION 8: WHERE THE STATE COURT DISCUSSED THE MERITS OF THE ISSUES BUT ALSO MENTIONED PROCEDURAL DEFAULT, WHETHER THIS QUALIFIES TO BAR FEDERAL COURT REVIEW IN LIGHT OF *HARRIS V. REED*, 489 U.S. 255; 109 S.CT. 1038; 103 L.ED.2D 308 (1989).

QUESTION 9: WHETHER THE STANDARD FOR DETERMINING WHETHER THERE WAS PROCEDURAL DEFAULT IN THIS CASE CONFLICTS WITH THE RULING OF THE SAME CIRCUIT IN *ABELA V. MARTIN*, 380 F.3D 815 (6TH CIR. 2004).

QUESTION 10: WHETHER IT IS PROPER FOR A COURT OF APPEALS TO MAINTAIN TWO CONFLICTING RULES ON THE SAME SUBJECT, PERMITTING JUDGES TO CHOOSE WHICHEVER RULE THEY WANT, DEPENDING ON WHETHER THEY WANT THE PETITIONER TO WIN OR LOSE.

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Petitioner

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PAUL RENICO, Warden

Respondent.

PETITION FOR A WRIT OF CERTIORARI

KUMAL BURTON, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Sixth Circuit Court of Appeals of December 6, 2004, rehearing denied March 2, 2005, affirming the denial of a Petition for Habeas Corpus.

OPINIONS BELOW

The Appendix includes the published opinion of the Sixth Circuit Court of Appeals of December 6, 2004, and denial of rehearing of March 2, 2005; the opinion of the United States District Court of November 13, 2002, and state court rulings of January 18, 2001, March 1, 2001, July 30, 2001, November 22, 1999, August 22, 1997, July 28, 1998.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Ingham County, Michigan, Circuit Court. The original judgment was entered June 28, 1995. The Michigan Court of Appeals affirmed August 22, 1997. The Michigan Supreme Court denied leave to appeal July 28, 1998. The state circuit court denied a Motion for Relief from Judgment on November 22, 1999. The Michigan Court of Appeals denied leave to appeal on January 18, 2001, rehearing denied March 1, 2001. The Michigan Supreme Court denied leave to appeal July 30, 2001. The Judgment of the United States District Court was November 13, 2002. Rehearing was denied March 11, 2003. The ruling of the Sixth Circuit Court of Appeals was issued December 6, 2004. Rehearing was denied March 2, 2005. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Kumal Burton was convicted of first degree murder and felony firearm in a jury trial in the Ingham County Circuit Court before the Hon. William E. Collette. On June 28, 1995, Judge Collette sentenced Petitioner to prison for life plus 2 years. Case No. 94-68306-FC.

On August 22, 1997, the Michigan Court of Appeals affirmed. Case No. 187771. On July 28, 1998, the Michigan Supreme Court denied leave to appeal. Case No. 110691. On November 22, 1999, Judge Collette denied a Motion for Relief from Judgment. On July 6, 2000, Petitioner through counsel filed a Delayed Application for Leave to Appeal to the Michigan Court of Appeals. On January 18, 2001, the Court of Appeals issued an Order denying the delayed application for leave to appeal. Case No. 228324. On January 25, 2001 Petitioner through counsel filed a Motion for Rehearing in the Court of Appeals, which was denied on March 1, 2001. The Michigan Supreme Court denied leave to appeal on July 30, 2001. Case No. 118940.

A Petition for Habeas Corpus was filed in United States District Court, Eastern District of Michigan. On November

13, 2002, Judge David M. Lawson issued an Opinion and Order denying the Petition for Habeas Corpus. On December 16, 2002, Judge Lawson issued an order granting in part and denying in part a Certificate of Appealability. On June 12, 2003, the Sixth Circuit issued an order granting in part and denying in part a Certificate of Appealability, but with more issues certified. The ruling of the Sixth Circuit Court of Appeal affirming the District Court was issued December 6, 2004. Rehearing was denied March 2, 2005.

Statement of Facts

This case involves the June 2, 1994 shooting death of Sherman McClayton in the parking lot of the Black and Tan Bar in Lansing. Catherine Ramirez testified she was at the bar that night, and when it closed at 2 a.m., there was a vehicle selling chicken in the parking lot, and people were lining up. She observed Darla Brandon speaking with Sherman McClayton. (T II, 128-136). She testified she saw Petitioner, whom she did not know, drive up, park a car, get out, shoot the victim, and drive away. (T II, 139).

Sonya Allen testified that she saw Big Dave in the bar with Big Mike (Petitioner Kumal Burton). She did not see the shooting itself. (T II, 171, 174).

Carlos Curtis testified that outside the bar, near the chicken stand, he saw the Petitioner and Mr. McClayton standing face to face and "grimming" each other and scowling. (T II, 218-221). He testified that Petitioner shot the victim. (T II, 224). He testified he took Mr. McClayton to the hospital. (T II, 230). Darla Brandon also saw Petitioner and McClayton frowning or grimming at each other. (T II, 303-307).

Jackie Robinson Harris testified that inside the bar Petitioner and McClayton were "having words." The victim was telling Petitioner that he did not like people from Detroit. (T II, 392-395). [Petitioner is from Detroit]. He testified that later, at another location, Petitioner told him that that's how

you "park" someone against the curb. (T II 406).

Harris testified that when Petitioner saw his name mentioned on TV, he said to Jackie Harris "I'm out of here." (T II, 413). Later the following day, Mr. Harris saw Petitioner, still in town. (T II, 414).

Witnesses Nikita and Markita Robinson were at Markita's residence [1] at 414 1/2 W. Lapeer. (T III, 470). A gun was kept at the house, and the prosecutor suggested that it was Petitioner's gun. (T III, 474-475). Nikita testified that as far as she knew it was the Petitioner's gun, but she did not know. (T III, 475-476). Witness Markita Robinson testimony that she "knew" it was Petitioner Burton's gun, but did not indicate how she knew that. (T III, 505). Nikita testified that Petitioner came around 2:00 a.m. and got the gun, and returned it to the house around 2:30 a.m. (T III 476-479). They did not explain what ever happened to that gun. No weapon was ever recovered. She testified that Petitioner told her he had killed someone. (T III, 480).

Markita Robinson testified that Petitioner came around 2:00 a.m., and declared that he was going to "smoke" Sherman, and that around 2:30 a.m. he returned and said that he had "smoked" Sherman. (T III, 497-499). She testified she heard him say the same thing the next day (T III, 502) and a week later (T III, 503-504).

Michigan State Police expert Robert Cilwa testified he found three 9 mm casings at the scene. (T II, 336-339). Dr. Laurence Simson testified that Mr. McClayton died from 5

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[1] The prosecutor repeatedly referred to this before the jury as a "drug safe house." Witness Jackie Harris testified only that it was a place where he kept some clothes to change. (T III, 402). Nikita Robinson referred to it as "my sister's house" and Markita Robinson referred to it as "my apartment." (T III, 501). There was no testimony that anyone stored or sold drugs at that house.

gunshot wounds. (T II, 406).

Off. Robert Gutierrez testified that after the shooting he interviewed Catherine Ramirez, and she told him she did not see who did the shooting. (T III, 514-515). He also interviewed Carlos Curtis after the shooting, and Curtis told him that he had not seen the shooting, but ducked down when he heard the shots. (T III, 515-516). Ramirez and Curtis were the only witnesses who testified that they saw Petitioner commit the shooting.

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER THE RIGHT TO COUNSEL AND DUE PROCESS WERE DENIED WHERE THE COURT SET A QUICK TRIAL DATE, THE RETAINED ATTORNEY NEEDED TIME TO PREPARE AND REQUESTED AN ADJOURNMENT, WHICH THE TRIAL COURT DENIED, CAUSING THE ATTORNEY TO WITHDRAW FROM THE CASE. ONCE THE ATTORNEY WAS OFF THE CASE, THE COURT NO LONGER NEEDED A QUICK TRIAL, AND POSTPONED THE TRIAL DATE FOR MONTHS, BUT BY THEN IT WAS TOO LATE TO GET THE ATTORNEY BACK.

QUESTION 2: WHETHER THE SIXTH CIRCUIT PANEL CAN DECLINE TO FOLLOW ANOTHER SIXTH CIRCUIT PANEL DECISION, WITHOUT FINDING ANY INTERVENING UNITED STATES SUPREME COURT OR SIXTH CIRCUIT EN BANC DECISION OVERRULING THE EARLIER CASE.

This case provides an opportunity for the United States Supreme Court to set standards on how fast a judge can make a defendant go to trial in a murder case, how enforcible is the defendant's right to proceed with retained counsel of his

choice, and whether the state court's purported need for speed is genuine where the state court abandons that purported need once the retained attorney is squeezed off the case.

Petitioner Kumal Burton was arrested in December 1994. (T III, 542). The prosecutor filed an Information charging him with first degree murder and felony firearm on January 11, 1995. On January 20, 1995, Judge Carolyn Stell set a trial date for February 27, 1995. Petitioner had his family look for an attorney to represent him. Ultimately, they retained attorney Thomas Warshaw, who entered his substitution on January 31, 11 days after the entry of the scheduling order.

There were at that point only 27 days until trial. In order to prepare, Petitioner Burton's retained counsel filed his first and only motion to adjourn trial. Petitioner was not present at the motion hearing, because incarcerated. Although the prosecutor stipulated to an adjournment, the judge refused. (T 2/22/95, 1-9). Defense counsel, knowing he could not be prepared for trial in time, withdrew from the case, finding that he had no other choice. (T 2/22/95, 5-9).

Once attorney Warshaw was off the case, the judge's perceived urgent need for an immediate trial was relaxed. The trial did not take place on February 27. On March 16, 1995, Judge Stell recused herself, and the case went to Judge William Collette.

The prosecutor, recognizing a possibility of reversible error, filed a motion for clarification of Petitioner's representation, heard May 11, 1995. However, by that time attorney Warshaw had made other commitments, and was not available on the new date. Therefore, Petitioner Burton's only choice was to proceed with the appointed attorney or do without representation. (T 5/11/95, 6-7).

A criminal defendant has the constitutional right to retain counsel of his choice for the trial. U.S. Const., Amend. VI. A criminal defendant has a constitutional right to an attorney who will conduct appropriate and timely

investigation, which requires adequate time. *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).

In *Powell v. Alabama*, 287 U.S. 45; 53 S.Ct. 55; 77 L Ed 158 (1932), the Court stated:

> "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

In *Ungar v. Sarafite*, 376 U.S. 575, 589; 84 S.Ct. 841; 11 L.Ed.2d 921 (1964), the U.S. Supreme Court issued general guidelines regarding the grant or denial of a Motion for Continuance:

> "The matter of a continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321. Contrariwise, a myopic insistence upon expeditious- ness in the face of a justifiable request for delay can render the right to defend with counsel a hollow formality. *Chandler v. Freitag*, 348 U.S. 3, 99 L.Ed. 4, 75 S.Ct. 1. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

A conviction may be reversed if a denial of continuance was arbitrary and tended to diminish the fairness of the trial. *United States v. Ploeger*, 428 F.2d 1204 (6th Cir. 1970).

To set a trial date in a first degree murder case just two months after the defendant's arrest is unheard of in Michigan. See *People v. Nard*, 78 Mich. App. 365 (1977), holding that regarding defense of a murder charge, an attorney "would not have been able adequately to prepare a defense in 26 days."

In *People v. Charles O. Williams*, 386 Mich. 565 (1972), Defendant requested to fire his lawyer and get a new one on the day of trial. the Michigan Supreme Court held:

> "The defendant requested a continuance in this case to obtain a new lawyer. The right to assistance of counsel is a precious constitutional right. It is probably the most important right of any defendant in a criminal trial."

In fact, a reasonable observer would have to conclude that in this case Judge Stell was not acting like a judge responsible for the important public business of seeing that a fair and constitutional trial would be held. She displayed "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" which "render[ed] the right to defend with counsel a hollow formality." *Ungar v. Sarafite*, supra. Yet, the moment attorney Warshaw was forced out, all the exigencies which Judge Stell had relied on disappeared, and it was months before the trial was held.

A showing of prejudice is not needed, because this is a structural error. *People v. Anderson*, 446 Mich. 392 (1994); *Brecht v. Abrahamson*, 507 U.S. 619; 113 S.Ct. 1710; 123 L.Ed.2d 353 (1993). This was not a trial error which "occur[s] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." The denial of the right to hire the attorney of his choice, and the

denial of time to prepare, happened before trial and were structural defects in the trial mechanism, and are not subject to quantitative assessment of harmlessness of the error.

Where the defendant is deprived of his right to retain the attorney of his choice, prejudice is presumed and need not be separately shown. *Glasser v. United States*, 315 U.S. 60; 62 S.Ct. 457; 86 L Ed 680 (1942); *Releford v. United States*, 288 F.2d 298 (9th Cir. 1961); *United States v. Ray*, 731 F.2d 1361 (9th Cir. 1984).

The state courts unreasonably deprived Petitioner of his counsel, and unreasonably refused to reverse for it. The federal court is not to defer to state court rulings that are unreasonable. *Williams v. Taylor*, 529 U.S. 362; 120 S.Ct. 1495; 146 L.Ed.2d 389 (2000); 28 U.S.C. §2254(d)(2).

That the state court action was unreasonable can be demonstrated by the fact that it is not even in compliance with state law cases on the subject. The Michigan courts have repeatedly recognized that improperly depriving a defendant of counsel of his choice is a structural error, and have not required a showing of prejudice. See *People v. Coones*, 216 Mich. App. 721 (1996); *People v. Johnson*, 215 Mich. App. 658 (1996). In *People v. Johnson*, the Court held that refusal to allow the Defendant to be represented by attorney Hess required reversal, even though they could not find any particular thing wrong with the quality of representation by the actual trial counsel.

"Because this case implicates the Sixth Amendment right to counsel, a harmless-error analysis does not apply under the circumstances presented." *People v. Johnson*, supra. "A 'harmless-error' analysis is not applicable where defendant's Sixth Amendment right to counsel was violated by the trial court. A 'prejudice' standard simply does not apply." *People v. Durfee*, 215 Mich. App. 677 (1996).

In rejecting this issue, the Michigan Court of Appeals ruled that because Petitioner accepted his fate at the May 11, 1995 hearing he waived the issue. Petitioner submits the

ruling was unreasonable. Petitioner had a retained attorney. The actions of Judge Stell unreasonably took the attorney from him. The actions of Judge Collette could not restore attorney Warshaw to Petitioner, because attorney Warshaw had by that time made other commitments.

As Petitioner said at the May 11 hearing (T 5/11/95, 10-11):

> "THE DEFENDANT: I already decided I like Mr. Brehler. But, like – as I said before, at the time, I was in a position to afford a retained attorney, like my family did. But, now, I'm in a disposition (sic) to do that. So now I'm forced to take the counselor now, and he's a good counselor. I'd like him to represent me, 'cause I can't afford an attorney now. But, have this – if this would have been tooken care of before the fact, sir, this would never be happening here today."
> THE COURT: Okay. So you don't want an opportunity, then, as I understand, to go out and try to find another lawyer?
> THE DEFENDANT: No, I can't afford one.
> THE COURT: Okay. You'd rather go with Mr. Brehler, then?
> THE DEFENDANT: It's the only choice I have left."

Petitioner submits it was unreasonable for the state courts to find this to be a waiver. Judge Stell committed constitutional error. The constitutional error deprived Petitioner of his right to attorney Warshaw. The right was not restored. The act of Petitioner in bowing to what was forced upon him is not any sort of waiver, and it was unreasonable to hold that it was.

In rejecting this issue, the District Court adopted the

trial court ruling that Petitioner "should not be able to manipulate the trial court's schedule by acquiring new counsel at the last minute." (Opinion, 7; A40). The problem is that the way this case was rushed to trial, everything would be "at the last minute." The lawyer filed his appearance 11 days after the trial date was set, which itself was less than a month after the arrest. To interpret this as foot-dragging is cynical and unfair.

As the District Court recognized, "A criminal defendant who desires and is financially able to retain his own counsel 'should be afforded a fair opportunity to secure counsel of his own choice.'" (Opinion, 6; A39). We submit that a reasonable jurist could find that when Judge Stell set the trial date 5 weeks away, and refused to allow an adjournment so retained attorney Thomas Warshaw could handle the case at trial, this was an unreasonable action that elevated convenience to the judge over Petitioner's right to counsel of his choice.

The District Court gave great weight to Petitioner being arraigned December 28 but not hiring an attorney until January 25. (Opinion, 7; A40). This shows a considerable lack of understanding about what it is like to be in jail. It also shows a lack of understanding about how difficult it is to find the right attorney when one is unfamiliar with the legal community in the city in question. While a judge who was not in jail could find an appropriate attorney in minutes just by picking up the phone and calling an acquaintance, a prisoner in jail has only meager and intermittent access to a phone, no list of attorney phone numbers, and no way of distinguishing a criminal attorney from other attorneys. Most importantly, he can only make collect calls, which many attorneys will not accept. The prisoner cannot exactly make an appointment to meet with an attorney at his office. He will see an attorney only if the attorney chooses to come and see him. A reasonable jurist could find that there was nothing unreasonable about the jailed Petitioner taking less

than a month to hire an attorney, where in fact most jailed defendants would require even more time than that.

It was conceded by the state court that Judge Stell abused her discretion. (Opinion, 8; A41). What the state court calls "abuse of discretion" would appear to qualify in federal court as action that is "unreasonable." However, the Sixth Circuit found no prejudice. We submit that because the actions of Judge Stell did in fact deprive Petitioner Burton of retained attorney Warshaw, that is all the prejudice that is needed, because being deprived of the attorney one has hired is a structural error, not subject to harmless error analysis. We submit that the granting of more time after the damage was already done was not an adequate remedy.

We submit that the Sixth Circuit should have followed the ruling in *Linton v. Perini*, 656 F.2d 207 (6th Cir. 1981), holding:

> "where the request is reasonable, where there have been no prior adjournments, where the length of delay is moderate, and where the adjournment seems to be for legitimate reasons, the court should allow a reasonable adjournment to permit a defendant to have retained counsel of his own choice.
>
> ...
>
> Under these circumstances, counsel's request was reasonable, and in denying it and forcing appellant's retained counsel to withdraw, the trial judge violated the Sixth Amendment right of appellant to retain counsel of his own choosing."

It was incorrect for the panel to invalidate *Linton v. Perini*. The normal rule is that a ruling by one panel is not subject to reversal by another panel except where there has been a Rehearing en Banc, and here there has been none. See *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985): "A panel of this Court cannot

overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this court sitting *en banc* overrules the prior decision." Because the panel herein did not cite any inconsistent decision of the United States Supreme Court or a decision of the Sixth Circuit sitting en banc, it was inappropriate for the panel to overrule and decline to follow *Linton v. Perini*.

The Sixth Circuit wrongly stated that Petitioner cold not afford an attorney, overlooking that Petitioner did pay an attorney: Thomas Warshaw. The trial court's actions made that expenditure worthless. The time and effort spent by Warshaw meeting with Petitioner and acquiring and going over the discovery was flushed down the drain by Judge Stell, along with the money that Petitioner's family had spent on him. Petitioner was able to afford an attorney. He simply was not able to afford two of them.

This Court should not countenance labeling as "reasonable" extreme haste by a judge to get the case to trial, haste which is abandoned by the judge as soon as it accomplishes the goal of impoverishing the Petitioner and removing his lawyer.

This Court should grant certiorari leading to Habeas Corpus relief requiring a new trial at which the court shall not interfere with Petitioner's actions and choices involving the hiring of counsel, and at which counsel is afforded adequate time to prepare for trial.

QUESTION 3: WHETHER THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WAS DENIED WHERE APPELLATE COUNSEL FAILED TO RAISE NUMEROUS MERITORIOUS ISSUES, AND RAISED POOR ISSUES INSTEAD.

QUESTION 4: WHETHER A STATE COURT RULING

OF NO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CAN BE SUSTAINED WHERE THE STATE JUDGE'S SOLE REASON FOR FINDING NO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS THAT SUCH A FINDING WOULD PERMIT DEFENDANTS TO AVOID THE OPERATION OF MICHIGAN COURT RULES DESIGNED TO PREVENT SECOND APPEALS.

QUESTION 5: WHETHER THE FEDERAL COURT FINDING OF NO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS PROPER WHERE IT MAKES ASSUMPTIONS THAT COUNSEL DID RESEARCH, CONSIDERED ISSUES, AND REJECTED THEM FOR TACTICAL REASONS, WITHOUT HOLDING ANY HEARING TO DETERMINE WHETHER THESE SPECULATIONS WERE ACTUALLY TRUE.

QUESTION 6: WHETHER AN ATTORNEY CAN BE FOUND TO HAVE PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE, THROUGH INADVERTENCE, NOT READING THE RECORD, UNFAMILIARITY WITH CONTROLLING CASE LAW, OR SOME OTHER REASON DID NOT MAKE A PROFESSIONAL JUDGMENT ON AN ISSUE.

QUESTION 7: WHETHER AN ISSUE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS BARRED FROM CONSIDERATION IN HABEAS CORPUS SIMPLY BECAUSE THE ATTORNEY, IN HIS BRIEF, FAILED TO ACCUSE HIMSELF OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In determining the question of whether there was ineffective assistance of counsel, the state court judge employed an outrageous rule that is clearly unreasonable.

We submit that the United States District Judge erred in bowing to that unreasonable ruling.

Instead of following the standards for ineffective assistance of counsel established by case law, the trial court followed its own rule that:

> "To merely state that prior counsel's failure to raise the points claimed somehow creates good cause would, in and of itself, obviate M.C.R. 6.508(D)(3)."

We submit that this ruling is a case of "having the tail wag the dog." Under the Supremacy Clause, the constitution is more important, and controlling over, contrary considerations such as state court rules. U.S. Const., Art VI, cl 2; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). If the constitution requires something, it cannot be dispensed with simply because a remedy interferes with the intent of a court rule to bar second appeals.

The judicial ruling in this case that prior counsel's failure to raise points automatically is deemed not to constitute good cause, because the court rules do not want it that way, "would, in and of itself, obviate" the constitutional requirement of effective assistance of counsel on appeal. A court cannot properly rule out an entire category of claims of unconstitutionality on the ground that recognizing such claims would interfere with the smooth operation of court rules.

The ruling elevating a court rule over the Constitution was unreasonable. *Williams v. Taylor*, 529 U.S. 362; 120 S.Ct. 1495; 146 L.Ed.2d 389 (2000); 28 U.S.C. §2254(d)(2).

By refusing to consider whether there was ineffective assistance of appellate counsel, and by applying a rule that ineffective assistance of appellate counsel can never be found where it would conflict with the smooth operation of a court rule, the trial court eliminated the constitutional requirement

of effective assistance of counsel on appeal. The trial court essentially found that the existence of the court rule precludes a finding of ineffective assistance of appellate counsel, in other words, that court rules can overrule constitutional requirements.

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); U.S. Const., Amend. VI. This right includes the right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387; 105 S.Ct. 830; 83 L.Ed.2d 821 (1985); *Penson v. Ohio*, 488 U.S. 75; 109 S.Ct. 346; 102 L.Ed.2d 300 (1988).

In *Beasley v. United States*, supra, the Court stated that, to be constitutionally adequate:

> "Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a timely manner."

Under *Evitts v. Lucey*, 469 U.S. at 396:

> "nominal representation on an appeal as of right--like nominal representation at trial--does not suffice to render the proceedings constitutionally adequate."

The critical failure of an attorney to object or raise an issue can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case or for success on appeal. *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996); *Kowalak v. United States*, 645 F.2d 534, 537-538 (6th Cir. 1981); *Corsa v. Anderson*, 443 F. Supp. 176 (ED Mich. 1977).

We submit there was ineffective assistance of appellate

counsel regarding the failure of the appeal attorney to raise the issues raised in the Motion for Relief from Judgment and in the Petition for Habeas Corpus.

It is reasonably probable that Petitioner Burton would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel. See *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious." Under *Mapes v. Coyle* and many other cases, a court may find ineffective assistance of appellate counsel from the failure to raise particular issues on appeal if the issues were obvious or should have been discovered, and if the failure to raise them was prejudicial. It is impossible to imagine how failure to raise these issues could have helped Mr. Burton's appeal in any way.

Numerous federal cases hold that failure to raise particular issues on appeal can be found to be ineffective assistance of appellate counsel, even if other plausible issues are raised on appeal. *Mapes v. Coyle*, supra; *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998); *Mason v. Hanks*, 97 F.3d 887 (7th Cir. 1996); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995); *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir.1991); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987).

As the Court held in *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994):

> "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."

"See, also, *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir.1991) ("His lawyer failed to raise either claim, instead raising weaker claims... No tactical reason--no

reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had."); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a "weak issue")." *Mayo v. Henderson*, supra.

The Sixth Circuit used the standard: "Counsel's decision not to raise an issue on appeal does not violate the Constitution unless such a decision is so suspect as to indicate that the petitioner effectively was without counsel." However, in *Strickland v. Washington*, supra, the Supreme Court held that ineffective assistance of counsel requires only that the attorney act unreasonably to the prejudice of the defendant, not that the attorney act so badly that the defendant is "without counsel." The Sixth Circuit erred by using a standard of total nonperformance instead of the standard of unreasonable and prejudicial performance.

The District Court found (Opinion, 15; A48) "Although these issues were not frivolous, the choice of appellate counsel not to raise them in favor of concentrating on the right-to-counsel issue on direct appeal is a strategic choice that does not fall below the level of competence in a constitutional sense." We submit that the District Court, not having held a hearing, simply speculated a professional decision that, in fact, was never made. No hearing was held, even though requested in both state and federal court, to determine whether the failure to raise the issues was sound professional judgment or not. No hearing was held to determine if there was actually a choice made by counsel, or whether the failure to raise issues was a result of counsel not being aware of the existence of the issue, or not being diligent. The Court simply presumed that counsel examined all the possible issues, and made a professionally competent decision to not raise the ones we have raised. We submit that Habeas Corpus decisions should not be based upon

speculation, but upon a record made at an evidentiary hearing. Where the state courts denied one, the federal court should hold one. *Blackledge v. Allison*, 431 U.S. 63, 72-73; 97 S.Ct. 1621; 52 L.Ed.2d 136 (1977); *Flippins v. United States*, 747 F.2d 1089, 1091-1092 (6th Cir. 1984); *Goodwin v. Johnson*, 132 F.3d 162 (5th Cir. 1998); *Medina v. Barnes*, 71 F.3d 363 (10th Cir. 1995); *Rhoden v. Rowland*, 10 F.3d 1457, 1460 (9th Cir.1993). See also *Michael Williams v. Taylor*, 529 U.S. 420; 120 S.Ct. 1479; 146 L.Ed.2d 435 (2000) [evidentiary hearing should be granted in federal court where it was denied in state court through no fault of the Petitioner].

The District Court should have considered what the appeal attorney actually did file in determining his constitutional adequacy. Apart from the counsel/adjournment issue, the attorney raised only one other issue, which was wholly frivolous. Specifically, counsel on appeal claimed error from the failure to instruct on voluntary manslaughter. However, the defense was that Petitioner did not do the killing, and there was no testimony of extreme provocation that would cause a reasonable person to lose control. *People v. Pouncey*, 437 Mich. 382 (1991). [The reference in the Court of Appeals ruling to other issues which "lacked merit" were issues raised by Petitioner pro se in a supplemental brief.]

There is no showing that appellate counsel considered, and then determined not to raise, the much stronger issues of bad acts evidence including alleged threats against a witness, where the bad acts were not attributable through evidence to the Petitioner; repeated evidence over objection about Petitioner being in jail; instruction on flight not supported by any evidence; instructions on the elements that omit critical portions of the CJI jury instructions; and prosecutor argument wrongly creating a "duty to convict."

In very brief summary, the issues overlooked by the original appellate counsel were as follows (as numbered in

the Petition for Habeas Corpus):

II. THE PROSECUTOR AND TRIAL COURT DENIED PETITIONER A FAIR TRIAL BY ADMITTING OTHER BAD ACTS NOT ATTRIBUTABLE TO PETITIONER THROUGH EVIDENCE.

Here, there was no testimony that Petitioner Kumal Burton had threatened Markita Robinson. Nevertheless, the prosecutor was permitted to use unsubstantiated innuendo to argue without evidence that Petitioner did that.

It is improper to use innuendo to suggest without proof that the defendant is guilty of other crimes. *United States v. Shelton*, 628 F.2d 54 (D.C. Cir. 1980). Even if established by evidence, fundamental fairness prohibits "the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity or knowledge." *Huddleston v. United States*, 485 U.S. 681, 685; 108 S.Ct. 1496; 99 L.Ed.2d 771 (1988).

III. THE PROSECUTOR AND TRIAL COURT DENIED PETITIONER A FAIR TRIAL BY ADMITTING TESTIMONY ABOUT PETITIONER BEING IN JAIL.

The testimony that Defendant had been in jail did not have the slightest legitimate tendency to prove any part of the prosecutor's case. The action of the prosecutor in asking Mr. Harris about threats by Petitioner, when he knew there were none, was improper. The action of the prosecutor in asking Mr. Harris about Petitioner's statement about officials putting them together, plainly showing them to have been in jail together, was improper. It is reversible even to force the defendant to wear clothing from which someone could surmise he was in jail *Estelle v. Williams*,

425 U.S. 501; 96 S.Ct. 1691; 49 L.Ed.2d 126 (1976). Direct testimony of being in jail is obviously even worse. The sequence of events in this case is almost identical to that in *People v. Greenway*, 365 Mich. 547 (1962), which led to reversal.

Law enforcement officials cannot be permitted to orchestrate an incident by placing in the same jail cell a murder defendant and a main witness against him. Where the placing of the witness together with the Petitioner fails to result in an assault or threat, it is irresponsible, and a deliberate infraction, for the prosecutor to go into the matter anyway, just to make sure that the jurors knew that Petitioner Burton was in jail.

IV. PETITIONER WAS DENIED A FAIR TRIAL BY IRRELEVANT AND PREJUDICIAL INSTRUCTIONS ON FLIGHT.

The day after the killing in Lansing prosecution witness Mr. Harris saw Petitioner, still in Lansing. (T II, 414). A week later, witness Markita Robinson saw Petitioner in Lansing. (T III 503-504).

There was no testimony that Petitioner ever did go back to his home town of Detroit, or left the Lansing area at all, for at least 6 months. Certainly, the undisputed testimony was that Petitioner was in Lansing a week later. Even if there had been such testimony, the action of going back to one's home town does not qualify as flight. Under Michigan law, in *People v. Hall*, 174 Mich. App. 686 (1989), the Court found that where an accused simply walked away from the scene of a crime, that was not flight, and a flight instruction was not justified. A juror would not feel free to find that there was no evidence of flight once the judge made it part of the instructions that there was such evidence.

Leaving town 6 months after a crime cannot

reasonably be determined to be flight. You need evidence of flight to support a flight instruction.

V. PETITIONER WAS DENIED A FAIR TRIAL BY INSTRUCTIONS THAT OMITTED ELEMENTS OF THE CRIME AND TENDED TO SHIFT THE BURDEN OF PROOF.

In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) the United States Supreme Court explained its ruling in *Rose v. Clark*, 478 U.S. 570; 106 S.Ct. 3101; 92 L.Ed.2d 460 (1986), followed the same rule announced by the Sixth Circuit in *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168 (6th Cir. 1986), and held that where the judge fails to have the jury decide on an element of the offense, the defendant is deprived of a jury verdict, a structural error that cannot be held to be harmless.

Furthermore, when the judge declined to place on the prosecution the duty to prove the absence of mitigation or justification, the judge necessarily placed on the Petitioner the duty to disprove those things, or have them taken as proven. This unlawfully shifted the burden of proof from the prosecutor to the Petitioner. *Francis v. Franklin*, 471 U.S. 307; 105 S.Ct. 1965; 85 L.Ed.2d 344 (1985).

VI. THE PROSECUTOR DENIED PETITIONER A FAIR TRIAL BY ARGUING THE JURY'S SO-CALLED "DUTY TO CONVICT," AND BY ARGUING THE FAILURE OF DEFENSE COUNSEL TO DECLARE TO THE JURY THAT PETITIONER WAS NOT GUILTY.

The law is that the jurors are required to follow their

consciences, and have no duty to convict, even when the prosecutor or judge believe the evidence is clear. *Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). When jurors acquit, even though the evidence would support a conviction, "it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan*, id. A duty to convict constitutes a directed verdict, which is unconstitutional. *Morissette v. United States*, 342 U.S. 346; 72 S.Ct. 240; 96 L.Ed. 288 (1952).

The actions of the defense counsel in not expressly saying Petitioner was innocent or not guilty do not provide any evidence supporting Petitioner's guilt. In fact, the comments of the attorneys are not to be taken as evidence at all. CJI2d 3.5. Yet, the prosecutor argued that the words chosen by the defense counsel constitute evidence of the Petitioner's guilt. The prosecutor shifts the burden of proof by arguing that the defense counsel had a burden or duty to declare Petitioner not guilty, and that the failure to fulfill that duty by the defense counsel means that Petitioner is guilty. The prosecutor's argument was also misleading and unfair because defense counsel did argue that Petitioner did not match the description of the shooter given by the witnesses.

Obviously, these issues are much stronger than the issue not supported by the evidence that was actually raised. Ineffective assistance of counsel subject to Habeas Corpus review can be found from the failure to raise issues, even if the underlying issues are not subject to Habeas Corpus review. *Kimmelman v. Morrison*, 477 U.S. 365; 106 S.Ct. 2574; 91 L.Ed.2d 305 (1986).

As the Court held in *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994):

> "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly

weaker."

Whether "stronger" or not, an attorney can make a professional judgment only about issues he is aware of and considers. If the attorney through inadvertence, not reading the record, unfamiliarity with controlling case law, or some other reason does not make a professional judgment on an issue, the failure to raise the issue is not the product of professional judgment. It was unreasonable to simply presume that the attorney knew and considered the issues without first finding out whether that was true.

This Court should grant Habeas Corpus relief, order an evidentiary hearing regarding ineffective assistance of appellate counsel, rule that Petitioner was prejudiced by ineffective assistance of appellate counsel, hear all issues on the merits, and order the state courts to grant a new appeal.

QUESTION 8: WHERE THE STATE COURT DISCUSSED THE MERITS OF THE ISSUES BUT ALSO MENTIONED PROCEDURAL DEFAULT, WHETHER THIS QUALIFIES TO BAR FEDERAL COURT REVIEW IN LIGHT OF *HARRIS V. REED*, 489 U.S. 255; 109 S.CT. 1038; 103 L.ED.2D 308 (1989).

QUESTION 9: WHETHER THE STANDARD FOR DETERMINING WHETHER THERE WAS PROCEDURAL DEFAULT IN THIS CASE CONFLICTS WITH THE RULING OF THE SAME CIRCUIT IN *ABELA V. MARTIN*, 380 F.3D 815 (6TH CIR. 2004).

QUESTION 10: WHETHER IT IS PROPER FOR A COURT OF APPEALS TO MAINTAIN TWO CONFLICTING RULES ON THE SAME SUBJECT, PERMITTING JUDGES TO CHOOSE WHICHEVER RULE THEY WANT, DEPENDING ON WHETHER THEY WANT THE PETITIONER TO WIN OR LOSE.

In *Simpson v. Jones*, 238 F.2d 399 (6th Cir. 2000), the Sixth Circuit held that if the Michigan Supreme Court cites to M.C.R. 6.508(D) in its order denying leave to appeal, that is a state court ruling of procedural default preventing Habeas Corpus relief. This rule applies even if the state trial court ruled on the merits. That is the rule the Sixth Circuit followed herein.

In *Abela v. Martin*, 380 F.3d 815 (6th Cir. 2004), the Sixth Circuit held that we must look at what the trial court did. If the trial court ruled on the merits, and the state Supreme Court denied leave to appeal, that is a ruling on the merits and the federal court can consider the issues.

We submit that *Abela v. Martin* is clearly the correct way to handle this situation, under the United States Supreme Court ruling in *Harris v. Reed*, 489 U.S. 255; 109 S.Ct. 1038; 103 L.Ed.2d 308 (1989), holding that a state court must clearly and unambiguously rely on procedural default to defeat a state prisoner's claim, in order for the federal court to "defer" to such a ruling.

The ruling herein is based on the legal fiction that a form order of the Michigan Supreme Court denying leave to appeal, and citing to M.C.R. 6.508(D), is a ruling of procedural default. This is a fiction because (1) Under Michigan law, the denial of leave to appeal is not a ruling on the merits of the case, (2) M.C.R. 6.508(D) refers to procedural default and to lack of prejudice, therefore a citation to the rule does not clearly show which one the court is relying on, (3) Michigan precedent shows that the Michigan Supreme Court uses the same language in denying all Motion for Relief from Judgment cases, even those not involving procedural default, (4) Michigan precedent says that a decision of the Circuit Court not appealed stays in force, meaning that a Circuit Court ruling that the issues can be decided on the merits is not overturned where leave to appeal has been denied, and the prosecutor has not appealed the ruling, (5) United States Supreme Court precedent,

Harris v. Reed, supra, says that even where there is arguable presence of procedural default, if the state court decides the issue on the merits anyway, Habeas Corpus review is not precluded.

The District Court's interpretation of *Simpson v. Jones* is that it does not matter what the lower state courts did regarding a Motion for Relief from Judgment, that the Michigan Supreme Court "cleans it up" by citing to a court rule in its order denying leave to appeal. We submit this legal fiction to be bad law, if it is to be the law. The refusal to look through the Michigan Supreme Court form order to what actually happened below is directly contrary to what the United States Supreme Court ruled in *Ylst v. Nunnamaker*, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1999). Further, court rule M.C.R. 6.508(D) applies both to procedural default, and to lack of prejudice, therefore a citation to the rule does not say which one the court is finding.

The rule applied here therefore requires the courts in the Sixth Circuit to employ a presumption precisely to the contrary of the presumption that *Ylst v. Nunnamaker* requires:

> "We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, **later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.** If an earlier opinion "fairly appear[s] to rest primarily upon federal law," *Coleman*, ante, at 740, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place."

The rule applied here is that it does not matter what the trial court did, that the presumption is that the Michigan Supreme Court did not uphold the trial court action on the same ground as used by the trial court.

The District Court's interpretation overlooks that the Michigan Supreme Court itself found the factual and legal underpinning of the *Simpson v. Jones* to be incorrect. In *People v. Jackson*, 465 Mich. 390 (2001), the Michigan Supreme Court denied on the merits claims raised in a Motion for Relief from Judgment, and used the same language used in the routine orders denying leave to appeal. In other words, the Michigan Supreme Court made clear that the reference to M.C.R. 6.508(D) is used by them to deny Motion for Relief from Judgment appeals where there has been a procedural default, and where there has not been one.

The District Court's interpretation overlooks that under Michigan law, a denial of leave to appeal is not a ruling on the merits. *Owendale-Gagetown School District v. State Board of Education*, 92 Mich. App. 719 (1979), aff'd. 413 Mich. 1 (1980). See also M.C.R. 7.321. The Sixth Circuit has recognized this rule in the past. *Raper v. Mintzes*, 706 F.2d 161 (6th Cir. 1983); *McKenzie v. Smith*, 326 F.3d 721 (6th Cir. 2003).

The District Court's interpretation overlooks that there is no preclusion of federal court review when the state court rules upon the merits of the issues despite the arguable presence of a procedural default. *Ulster County Court v. Allen*, 442 U.S. 140; 99 S.Ct. 2213; 60 L.Ed.2d 777 (1979); *Harris v. Reed*, 489 U.S. 255; 109 S.Ct. 1038; 103 L.Ed.2d 308 (1989). The Michigan Court of Appeals and Michigan Supreme Court in this case issued no rulings on the merits, but merely denied leave to appeal. The ruling below directly contradicts *Ylst v. Nunnamaker* and *Harris v. Reed.*

A presumption that every denial of leave to appeal by the Michigan Supreme Court in a Motion for Relief from

Judgment case is a ruling of procedural default is a legal fiction that is unworthy of United States jurisprudence. As the Court held in *Harris v. Reed*, supra:

> [T]his Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds."
>
> ...
>
> The question whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment may be rendered difficult by ambiguity in the state court's opinion. In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court laid down a rule to avoid the difficulties associated with such ambiguity. Under *Long*, if "it fairly appears that the state court rested its decision primarily on federal law," this Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." Id., at 1042.
>
> ...
>
> Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim
>
> ...
>
> [A] federal claimant's procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default.

In *Harris v. Reed*, the mere fact that the state Supreme Court mentioned procedural default did not bar federal court

review where the state court did not clearly state that they were refusing to hear the issues because of procedural default.

Where, as here, the Michigan Supreme Court denies leave to appeal in a form order used in all Motion for Relief from Judgment cases, citing to a rule that covers procedural default and other reasons for denying relief, and the lower court expressly does rule on the merits rather than deny review on the basis of alleged procedural default, there has not been a "plain statement" by the state courts that there will not be review because of procedural default. The rule of *Simpson v. Jones* that requires the federal courts in the Sixth Circuit to pretend that the Michigan Supreme Court has issued a clear ruling of procedural default when it has not, is directly contrary to *Harris v. Reed* and *Ylst v. Nunnamaker* and should no longer stand where it can continue to deny justice to litigants in Michigan federal courts.

CONCLUSION

Petitioner Kumal Burton respectfully submits that for the reasons stated above, this Court should grant Certiorari and Habeas Corpus relief requiring a new trial, or remand the case for consideration of the issues not heard because the Sixth Circuit followed *Simpson v. Jones*, 238 F.2d 399 (6th Cir. 2000) instead of *Abela v. Martin*, 380 F.3d 815 (6th Cir. 2004).

Respectfully submitted,

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Dated: May 27, 2005

NO. 02-2489

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KUMAL BURTON,

Petitioner-Appellant,

v. ORDER

PAUL RENICO, WARDEN,

Respondent-Appellee.

BEFORE: SILER, MOORE, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/S/

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 04a0420p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KUMAL BURTON,

Petitioner-Appellant,

v. No. 02-2489

PAUL RENICO, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 01-10287—David M. Lawson, District Judge.
Argued: August 11, 2004
Decided and Filed: December 6, 2004
Before: SILER, MOORE, and COLE, Circuit Judges.

COUNSEL

ARGUED: James Sterling Lawrence, Detroit, Michigan, for Appellant. Debra M. Gagliardi, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** James Sterling Lawrence, Detroit, Michigan, for Appellant. Laura Graves Moody, OFFICE OF THE

ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. On May 26, 1995, Petitioner-Appellant, Kumal Burton, was convicted of first-degree murder in violation of Mich. Comp. Laws § 750.316 and possession of a firearm during the commission of a felony in violation of Mich. Comp. Laws § 750.227b. On June 28, 1995, Burton was sentenced to life imprisonment for his first-degree murder conviction and two years' imprisonment for the firearm charge. Burton now appeals the district court's decision denying his petition for a writ of habeas corpus. We **AFFIRM**.

I. BACKGROUND

Burton's convictions arise from the June 3, 1994 shooting death of Sherman McClayton in the parking lot of the Black and Tan Bar in Lansing, Michigan. At some time before 2:00 a.m. on June 3, 1994, Burton and McClayton had a disagreement at the Black and Tan Bar, with McClayton apparently telling Burton (a Detroit resident) that he did not like people from Detroit. Later, at around 2:00 a.m., Burton arrived at the West Lapeer Street residence of Markita Robinson. Markita Robinson and her sister, Nikita Robinson, testified that Burton retrieved a firearm from the residence and said he was going to kill McClayton. Burton then left the residence and drove back to the Black and Tan Bar. When Burton arrived, several people were standing in the parking lot near a food truck selling chicken. Burton parked his car and stepped out of the vehicle. Burton and McClayton frowned or scowled at one another, and then Burton fired several shots at McClayton, got in his car, and drove away. Burton returned to the West Lapeer residence around 2:30 a.m., told the Robinson sisters that he had killed McClayton, and asked the Robinsons to take the gun, which was hot and smelled of smoke.

Several months later, in September 1994, Burton and an acquaintance, Jackie Robinson Harris, were watching television when a news broadcaster announced that Burton was the shooter in the McClayton incident. Upon hearing the announcement, Burton grabbed his keys and left, saying, "I'm out of here." Later that evening, Burton said he was returning to Detroit. Burton was subsequently arrested in Detroit in December 1994, and on January 11, 1995, the State of Michigan filed an information charging Burton with first-degree murder and possession of a firearm during the commission of a felony.

Following Burton's arrest, George Zulakis, a court-appointed attorney, was assigned to represent Burton. On January 20, 1995, Ingham County Circuit Court Judge Carolyn Stell set the case for trial on February 27, 1995. Burton's family collected the funds necessary to retain private counsel for Burton, and on January 26, 1995, Thomas Warshaw filed with the Ingham County Circuit Court a notice of his substitution as counsel in place of Zulakis.

In early to mid February 1995, Warshaw filed a motion with the Ingham County Circuit Court to adjourn trial. Warshaw, apparently unaware of the court's procedural rules, failed to contact the court clerk to set a hearing date for the motion, and the motion was not heard until February 22, 1995, which was only five days before Burton's scheduled trial date and was the last day when pre-trial motions would be heard. During the hearing on the motion to adjourn, Warshaw stated that he would need additional time to prepare, particularly in light of discovery materials he had only recently received from Zulakis. Although the prosecution stipulated to the adjournment, Judge Stell denied Warshaw's motion. Warshaw then moved to withdraw from the case, and Judge Stell granted his motion. Burton was not in attendance at the motion hearing.

For unknown reasons, Burton's trial did not commence on February 27, 1995 as scheduled. Rather, on March 16, 1995, Judge

Stell recused herself, and the case was reassigned to Judge William Collette. On May 11, 1995, Judge Collette heard the prosecution's Motion to Clarify Defendant's Representation. At the hearing, Judge Collette offered to adjourn trial so Burton could retain other counsel. Burton declined, however, stating that he liked his current court-appointed counsel, Joseph Brehler, and that Warshaw was no longer available because Burton lacked the funds to retain Warshaw and because a disagreement with Warshaw had since developed.

Burton's trial commenced on May 22, 1995. Burton did not take the stand. A jury convicted Burton on both counts, and he was sentenced to life imprisonment for first-degree murder and two years' imprisonment for possession of a firearm during the commission of a felony.

Burton appealed his conviction to the Michigan Court of Appeals, alleging that: (1) Judge Stell's refusal to grant a continuance violated his right to counsel under the Michigan and U.S. constitutions; (2) the trial court erred in not instructing the jury regarding the lesser-included offense of voluntary manslaughter; (3) he had been deprived of his constitutional right to a jury drawn from a fair cross-section of the community; (4) the prosecution deprived him of his right to a fair trial by using false and perjured testimony; and (5) the cumulative effect of the aforementioned trial errors deprived him of his right to a fair trial.[1] The Michigan Court of Appeals denied Burton's appeal and affirmed his conviction on August 22, 1997. The Michigan Supreme Court denied Burton's Delayed Pro. Per. Application for Leave to Appeal, stating in its order that the court was "not

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[1] In May 1996, an attorney with the Michigan State Appellate Defender Office filed Burton's Brief on Appeal raising the issues of counsel of choice and voluntary manslaughter instruction. In April 1997, Burton filed an Appellant's Pro. Per. [In Propria Persona] Supplemental Brief asserting the jury selection, prosecutorial misconduct, and cumulative trial errors claims.

persuaded that the questions presented should be reviewed by this Court." Joint Appendix ("J.A.") at 144 (Mich. Sup. Ct. Order July 28, 1998).

Burton next sought post-conviction relief in the Michigan courts, filing a Motion for Relief from Judgment in the Ingham County Circuit Court. Burton asserted several new bases for relief: (1) that he had been denied a fair trial based on the admission of other-acts evidence regarding guns stored at a "safe house" and possible intimidation of prosecution witnesses; (2) that the prosecutor had engaged in misconduct by telling the jury they had a duty to convict and by commenting on defense counsel's failure to say that Burton was not guilty; (3) that the trial court erred in instructing the jury regarding flight; (4) that the trial court provided an erroneous instruction to the jury regarding the elements for establishing murder; (5) that the prosecutor erred in introducing evidence that Burton had been in jail with one of the prosecution's witnesses; and (6) that his sentence constituted cruel and unusual punishment under the Michigan constitution and violated Michigan statutory law. The Ingham County Circuit Court denied Burton's motion
on November 22, 1999, stating that:

> Each of the grounds claimed by the Defendant could have easily been raised in the prior appeal filed on behalf of this Defendant. To merely state that prior counsel's failure to raise the points claimed somehow creates good cause would, in and of itself, obviate MCR 6.508(D)(3).
>
> In addition, the Court finds no merit to the claims as asserted by this Defendant. This Court, after a careful review of the brief of the Defendant and the response filed by the prosecution, does not find that there are any grounds for relief from judgment and, accordingly, the motion is denied.

J.A. at 93-94 (Ingham County Cir. Ct. Op. and Order Nov. 22, 1999). Burton filed a Delayed Application for Leave to Appeal with the Michigan Court of Appeals, which denied relief "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." J.A. at 145 (Mich. Ct. App. Order Jan. 18, 2001). The Michigan Court of Appeals denied Burton's Motions for Rehearing and Leave to File Amended Delayed Application for Leave to Appeal on March 1, 2001. Burton then filed with the Michigan Supreme Court a Delayed Application for Leave to Appeal from the Michigan Court of Appeals's January 18, 2001 decision, which the Michigan Supreme Court denied on the basis that Burton "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." J.A. at 146 (Mich. Sup. Ct. Order July 30, 2001).

Burton then turned to the federal courts, filing a petition for a writ of habeas corpus with the U.S. District Court for the Eastern District of Michigan on August 3, 2001. Burton's petition asserted several grounds for relief: (1) that he had been denied the right to retain counsel of choice; (2) that the trial court improperly admitted other-acts evidence; (3) that the trial judge improperly admitted testimony regarding his pre-trial incarceration; (4) that the trial court gave irrelevant and prejudicial jury instructions regarding flight; (5) that the trial judge omitted from the jury instructions an element of the crime of murder; (6) that the prosecutor engaged in misconduct by arguing to the jury that they had a duty to convict and commenting during closing arguments that defense counsel failed to state that Burton was not guilty; and (7) that his counsel on direct appeal had been constitutionally ineffective. The district court denied Burton's right to counsel of choice claim on the merits, concluding that Burton's right to counsel of choice was preserved when Judge Collette offered to adjourn trial so that Burton could engage new retained counsel. The district court also denied Burton's remaining claims on the basis that Burton had procedurally defaulted such claims by failing to raise them on direct appeal. Because Burton failed to establish cause and prejudice or actual innocence, the district court concluded that Burton's procedural default in the state courts

barred habeas corpus relief in the federal courts.

The district court granted a certificate of appealability with respect to the issue of whether Burton stated a claim for ineffective assistance of counsel on direct appeal, and if so, whether such ineffective assistance of appellate counsel furnished the cause and prejudice necessary to overcome procedural default. This court then granted a certificate of appealability regarding the merits of Burton's right to counsel of choice claim.

II. ANALYSIS

Pursuant to 28 U.S.C. § 2253(c), the district court and this court have jurisdiction to certify for appeal issues relating to the denial of a petition for habeas corpus. This court has jurisdiction to hear such appeals, *id.*, and we review de novo district court judgments granting or denying petitions for a writ of habeas corpus. *See McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003). Because the district court did not conduct an evidentiary hearing but rather relied on the trial transcript in making its fact findings, we must review the district court's factual findings de novo. *Bugh v. Mitchell*, 329 F.3d 496, 500 (6th Cir.), *cert. denied*, 124 S. Ct. 345 (2003).

When a party seeks a writ of habeas corpus challenging state-court determinations regarding constitutional issues, we presume that the state court's findings of fact are correct unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). A writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). When a state court has not adjudicated a claim on the merits, we review the issue de novo. *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1145 (2004) (stating that when "there are simply no results, let alone reasoning, to which this court can defer . . ., any attempt to determine whether the state court decision was contrary to, or involved an unreasonable application of clearly established Federal law would be futile. If deference to the state court is inapplicable or inappropriate, we exercise our independent judgment and review the claim *de novo*.") (internal quotation marks and citations omitted).

A. Right To Counsel Of Choice

Attendant in the Sixth Amendment right to counsel is the right to secure counsel of one's choice. *Linton v. Perini*, 656 F.2d 207, 208 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) ("It is axiomatic that in all criminal prosecutions the accused enjoys the right to have assistance of counsel for his defense, and implicit in this guarantee is the right to be represented by counsel of one's own choice.") (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). The right to counsel of choice is not absolute, however, and "may not be used to unreasonably delay trial." *Id.* at 209.

The Michigan Court of Appeals on direct appeal determined that, while Judge Stell abused her discretion in denying Burton's request for a continuance, Burton's Sixth Amendment rights had not been violated because Judge Collette offered to adjourn trial so that Burton could secure retained counsel:

> Defendant first claims his convictions must be reversed because the trial court's refusal to grant a continuance to permit his retained counsel to prepare a defense for trial violated his right to counsel under both the federal and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, §20. Although we agree the trial court abused its discretion in failing to grant defendant's request for a continuance, *People v Wilson*, 397 Mich 76; 243 NW2d 257 (1976), reversal is not mandated in this case. Generally, prejudice need not be demonstrated where a defendant is denied the Sixth Amendment right to counsel of the defendant's choice. See *People v Johnson*, 215 Mich App 658; 547 NW2d 65 (1996) and cases cited therein. However, here, shortly after denying the continuance, the trial judge disqualified herself and the matter was assigned to a different judge who provided defendant the option of adjourning trial to allow him the opportunity to obtain other etained counsel. Defendant declined the offer and stated his satisfaction with his appointed counsel. Thus defendant declined to exercise the very right he now claims he was denied. No reversal is required.

J.A. at 142 (Mich. Ct. App. Op. at 1).

Supreme Court precedent does not dictate a finding that the Michigan Court of Appeals's decision was contrary to or an unreasonable application of clearly established federal law.[2] As the

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[2] We do not agree with Burton's contention that our decision in *Linton* controls this case. Pursuant to 28 U.S.C. § 2254(d)(1), our

Court noted in *Powell v. Alabama*, a defendant has a right to a "*fair opportunity* to secure counsel of his own choice." 287 U.S. 45, 53 (1932) (emphasis added). The Michigan Court of Appeals was reasonable in concluding that Judge Collette's offer to adjourn Burton's trial so that Burton could arrange for representation by his prior retained counsel provided Burton the fair opportunity to secure counsel of choice required by *Powell*. The record indicates that, ultimately, Burton was not represented by his original choice for retained counsel, Thomas Warshaw, because a personal disagreement developed between the two and because Burton's financial circumstances were such that he could no longer afford privately retained counsel. J.A. at 157-58
(Mot. to Clarify Def.'s Representation at 6-7) (Test. of Thomas Warshaw); J.A. at 161-62 (Mot. to Clarify Def.'s Representation at 10-11) (Test. of Kumal Burton); *see Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) ("Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."). Because the Michigan Court of Appeals's denial of

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review of the Michigan Court of Appeals's decision is limited to whether Supreme Court precedent establishes that Burton's Sixth Amendment right to counsel of choice was violated. In *Doan v. Brigano*, we explained that, "As is dictated by the statute, we may not look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law." 237 F.3d 722, 729 (6th Cir. 2001) (internal quotation marks and citation omitted). Also, because *Linton* was decided prior to the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),
the deferential standard of review we must apply in this case under § 2254(d)(1) did not similarly constrain the *Linton* court in its habeas review of an Ohio state-court decision.

Burton's claim was not contrary to or
an unreasonable application of Supreme Court precedent regarding the Sixth Amendment right to counsel of choice, federal habeas corpus review affords Burton no relief.

Even if Burton's claim is viewed as a constitutional challenge to the denial of his motion for a continuance, it cannot be said that the Michigan Court of Appeals's decision was contrary to or an unreasonable application of Supreme Court precedent. Denial of a continuance rises to the level of a constitutional violation only when there is "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'. . . ." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)); *see Ungar*, 376 U.S. at 591 ("These matters are, of course, arguable, and other judges in other courts might well grant a continuance in these circumstances. But the fact that something is arguable does not make it unconstitutional."). The circumstances of a particular case determine whether the denial of a continuance is so arbitrary as to violate due process. *Ungar*, 376 U.S. at 589 ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."). A defendant must also show that the denial of a continuance actually prejudiced his or her defense. *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003) ("Actual prejudice may be demonstrated by showing that additional time would have made relevant witnesses available or otherwise benefit[t]ed the defense."). While the Michigan Court of Appeals did find that Judge Stell abused her discretion in denying Burton's motion for a continuance, his trial date was in fact pushed back approximately three months as a result of the case being transferred to Judge Collette. After viewing the totality of the circumstances in this case, it cannot be said that Judge Stell's denial of Burton's motion for a continuance resulted in Burton being deprived of his constitutional rights,
so the Michigan Court of Appeals's denial of relief on this score was not contrary to or an unreasonable application of Supreme

Court precedent.

B. Ineffective Assistance Of Appellate Counsel

In denying Burton's petition for a writ of habeas corpus, the district court determined that all of Burton's claims, with the exception of his right to counsel of choice argument, are not subject to federal habeas corpus review because Burton procedurally defaulted such claims. Burton contends that his procedural default should be excused because the default was caused by his counsel's ineffective assistance on direct appeal and because he has suffered actual prejudice as a result of such ineffective assistance. We conclude that Burton's counsel on direct appeal was not so ineffective as to give rise to a constitutional violation and therefore affirm the district court's ruling that Burton's procedural default bars federal habeas relief.

When a criminal defendant has procedurally defaulted his or her ability to obtain federal habeas relief by failing to comply with a state procedural rule, the defendant must show "cause and prejudice" or actual innocence in order to overcome the procedural default. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) (explaining that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (setting forth "cause and prejudice" test for overcoming procedural default); *Maupin v. Smith*, 785 F.2d 135, 138-39 (6th Cir. 1986) (noting application of "cause and prejudice" test in cases of procedural default and setting forth guidelines for actual prejudice inquiry). As Burton has not sought relief under the actual innocence exception to procedural default, we must determine whether Burton has demonstrated cause to excuse his procedural default and, assuming his constitutional rights have been violated, whether such violations resulted in actual prejudice.

Ineffective assistance of appellate counsel, if it rises to the

level of a constitutional violation, can serve as cause to excuse the procedural default of claims brought in a habeas corpus proceeding. *Buell v. Mitchell*, 274 F.3d 337, 351-52 (6th Cir. 2001) ("[The petitioner's] ineffective assistance of appellate counsel claims can serve as cause for the procedural default of his other claims only if [the petitioner] can demonstrate that his appellate counsel was constitutionally ineffective. To do so, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense.") (citing *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under *Strickland*, a petitioner must show that "the performance of counsel fell 'below an objective standard of reasonableness'" and that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003) (quoting *Strickland*, 466 U.S. at 688, 694).

Counsel's decision not to raise an issue on appeal does not violate the Constitution unless such a decision is so suspect as to indicate that the petitioner effectively was without counsel:

> In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors undermine the reliability of the defendant's convictions. Strategic choices by counsel, while not necessarily those a federal judge in hindsight might make, do not rise to the level of a Sixth Amendment violation.

McMeans v. Brigano, 228 F.3d 674, 682 (6th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001) (citations omitted). In *Mapes v. Coyle*, we identified eleven factors to be considered when evaluating a claim of ineffective assistance of appellate counsel:

(1) Were the omitted issues "significant and obvious"?

(2) Was there arguably contrary authority on the omitted issues?

(3) Were the omitted issues clearly stronger than those presented?

(4) Were the omitted issues objected to at trial?

(5) Were the trial court's rulings subject to deference on appeal?

(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

(7) What was appellate counsel's level of experience and expertise?

(8) Did the petitioner and appellate counsel meet and go over possible issues?

(9) Is there evidence that counsel reviewed all the facts?

(10) Were the omitted issues dealt with in other assignments of error?

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

171 F.3d 408, 427-28 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999) (citations omitted). Even if the unasserted claims are not frivolous, the requisite prejudice cannot be shown if the claims are found to lack merit. *Buell*, 274 F.3d at 352.

1. Admission Of Other-Acts Evidence

Burton first asserts that the trial court erred in admitting other-acts evidence in the form of suggestions by the prosecutor that witnesses had been threatened and that a residence connected to Burton was a "safe house." For the admission of evidence to violate constitutional due process, it must be shown that admitting

the evidence violates "fundamental fairness," i.e., that it "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *Dowling v. United States*, 493 U.S. 342, 352-53 (1990) (internal quotation marks and citations omitted); *see Coleman v. Mitchell*, 268 F.3d 417, 439 (6th Cir. 2001), *cert. denied*, 535 U.S. 1031 (2002) (stating in reference to habeas corpus challenge to admission of otheracts evidence that "[s]tate court evidentiary rulings do not rise to the level of due process violations unless they offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.") (internal quotation marks and citations omitted); *see also Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001) ("Errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding.") (internal quotation marks and citation omitted).

a. Reference To Threatening Of Witnesses

Burton asserts that the following exchange between the prosecutor and Markita Robinson on redirect examination was in error because the prosecutor elicited testimony suggesting that Robinson had been threatened:

> Q. What was the reason that you didn't contact the police before October 27th?
> A. 'Cause I was scared.
> Q. Scared of what.
> A. Something happening to me.
> Q. For what reason.
> A. Threats. Through threats. I was just scared that something might happen to me and fear of my life.

J.A. at 31 (Br. in Support of Pet. for Habeas Corpus at 8) (quoting Trial Tr. Vol. III at 509-10). However, the prosecutor's line of

questioning was in response to cross-examination by defense counsel suggesting that the witness had not contacted the police at the time of the events in question:

> Q. Now, prior to October 27th, you did not contact the police, is that correct?
> A. No.
> Q. And neither you nor your sister, as far as you know, contacted the police.
> A. No.

Trial Tr. Vol. III at 509. It does not appear that the prosecutor violated Michigan Rule of Evidence 404(b)(1), much less constitutional due process, because the prosecutor elicited the challenged testimony, not to prove Burton's character "in order to show action in conformity therewith," but rather to explore more fully the issue, first raised by defense counsel, as to why the witness did not report Burton's conduct to the police. Mich. R. Evid. 404(b)(1); *see Pennington v. Lazaroff*, No. 98-4373, 2001 WL 406420, **4 (6th Cir. Apr. 3, 2001) (stating that "if properly before the court, we could only conclude that the introduction of the prior misconduct did not violate 'fundamental fairness.' . . . The prior misconduct . . ., coupled with the evidence of [the defendant's] threats and the victims' fear and guilt, helped explain the victims' reasons for not exposing [the defendant's] transgressions. Hence, the evidence of other misconduct was more probative than prejudicial, and its admission did not violate the due process clause.").

Given the difficulties in establishing that the admission of evidence regarding possible threats against witnesses was fundamentally unfair in this case, an objectively reasonable lawyer could have chosen not to raise this issue on appeal. Because the substance of Burton's other-acts-evidence claim lacks merit, Burton has failed to show a reasonable probability that his conviction would have been reversed on direct appeal even if appellate counsel had raised the issue. Thus, Burton has not demonstrated that his counsel on direct appeal was constitutionally

ineffective, and in turn has failed to establish the requisite cause for excusing his procedural default of this claim.

b. Prosecutorial Use Of The Term "Safe House"

Burton also alleges that his counsel on direct appeal was constitutionally ineffective in failing to challenge the prosecutor's repeated reference to a residence linked to Burton as a "safe house" where firearms were kept. Burton contends that the prosecutor used the term "safe house" for the purpose of impermissibly characterizing Burton as a person with a propensity to commit illegal acts, citing as an example the prosecutor's statement during closing argument: "'Why do I keep a 9 mm in the safe house? These are all the acts, ladies and gentlemen, of a very innocent person, aren't they? It's all evidence on this record.'" J.A. at 32 (Br. in Support of Pet. for Habeas Corpus) (quoting Trial Tr. Vol. IV at 52).

Burton's contention that the prosecutor's references to a "safe house" where firearms were kept constituted inadmissble other-acts evidence is undermined by the fact that the prosecution seems to have intended to use such testimony to establish that Burton had access to a nine-millimeter handgun like the one used to kill the victim.[3] Because the murder weapon itself does not

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[3] *See* Trial Tr. Vol. II at 402 (Test. of Jackie Robinson Harris) ("Q. All right. But this house on Lapeer Street, there were two twins there. A. Yeah, I only been there about two or three times. Q. You'd only been there two or three times. All right. What kind of house is that on Lapeer Street? What do you call that? Does it have a name? . . . Q. All right. What do they call 'em? Safe house? A. Yeah, that's where we kept our clothes. That where Dave kept his clothes I know —"); Trial Tr. Vol. II at 403-04 (Test. of Jackie Robinson Harris) ("Q. And, instead, Kumal came there. A. Yeah. . . . Q. Came to the house that you were at on Lapeer Street? A. Yes. Q. One of these safe houses? A. Yeah you could call it that. . . . A.

appear to have been introduced in evidence at trial, evidence of Burton's connections to the West Lapeer residence and the presence at that location of the particular type of weapon used to kill McClayton did have probative value with respect to a material issue other than Burton's character. *See People v. VanderVliet*, 508 N.W.2d 114, 122, 126 (Mich. 1993) (noting that "[r]elevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith," and establishing that, for other-acts evidence to be admissible, "the prosecutor must offer the other acts evidence under something other than a character to conduct theory," "the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial," and "the danger of undue prejudice [must] substantially outweigh[] the probative value of the evidence") (internal quotation marks and citation omitted); *see also Waters v. Kassulke*, 916 F.2d 329, 336 (6th Cir. 1990) (finding that due process was not violated by the admission of other-acts evidence because the evidence was relevant to the case's central issues of knowledge and intent and the evidence's probative value outweighed its

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It was, like, I never did run back into Kumal until I went over there one day — I was with Dave, and Dave, when he got something — I went up in there — that's all I heard. Q. Up in there, being at — A. Safe house. Q. — Lapeer? A. Yeah, see Dave — Q. Safe house on Lapeer."); Trial Tr. Vol. II at 408 (Test. of Jackie Robinson Harris) ("Q. . . . At or about that time, June the 3rd, did you ever see [Burton] in possession of a nine millimeter? A. No. Q. Do you know whether any nine millimeters were kept in the safe house? A. Yeah. Q. How many? A. There was only — there was only two of 'em that I saw. Q. Two nine millimeters that you saw in the safe house. A. Yes."); Trial Tr. Vol. II at 416 (Test. of Jackie Robinson Harris) ("Q. In June of 1994, did you ever see Kumal Burton with a nine millimeter? A. No. Q. And the nine millimeters that you were aware of in the safe house, do you know who those belonged to? A. No, I — I don't ask no — I didn't asked who they belonged to.").

prejudicial effect).

Although the use of the term "safe house" might have been somewhat prejudicial, it cannot be said that the term was so prejudicial as to render Burton's trial fundamentally unfair. Moreover, the prosecutor's use of the term "safe house" without objection by Burton's trial counsel may have factored in the decision of Burton's counsel not to raise this issue on direct appeal. *See People v. Bullock*, 485 N.W.2d 866, 870 n.7 (Mich. 1992) (rejecting argument that trial court erred by admitting other-acts evidence because the defendant "failed to raise any timely objection at trial on the basis of MRE 404(b)"); *see also People v. Buck*, 496 N.W.2d 321, 330 (Mich. 1993) ("Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no objection or curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from our failure to review the claims of misconduct."). Hence, Burton's counsel on direct appeal was not constitutionally defective for failing to raise this claim, and there is not a reasonable probability that Burton's conviction would have been reversed on appeal. Because Burton has failed to demonstrate ineffective assistance of appellate counsel, this claim remains procedurally defaulted.

2. Testimony Regarding Burton's Incarceration

Burton's second procedurally defaulted claim is that his constitutional due process rights were violated when a witness for the prosecution stated on direct examination that he had been incarcerated with Burton. During the course of direct examination of Jackie Robinson Harris, the prosecutor asked Harris whether he had "received any threats from" Burton, to which Harris replied, "Well, I was in the bull pen with him over to the —." Trial Tr. Vol. II at 416 (Test. of Jackie Robinson Harris). Defense counsel raised an objection, the court held a bench conference, and the prosecutor then questioned Harris outside the presence of the jury. At the end of the questioning, the prosecutor and defense counsel determined

that they did not wish to present any of the testimony elicited to the jury. Trial Tr. Vol. II at 416-19. Before the jury returned to the courtroom, the prosecutor made the following statement:

> And just so the witness knows and the Court knows and Mr. Brehler [defense counsel] knows, I will be asking [Harris] about two felony convictions that he pled to that he's under sentence for. And they're both of the type that fall under the court rule, because they are in the court rule category.[4] And those are the only two that he has on his record.

Trial Tr. Vol. II at 419. Defense counsel entered no objection, and the prosecutor concluded his questioning by establishing Mr. Harris's convictions for felony larceny and attempted armed robbery. Trial Tr. Vol. II at 420.

In support of his claim, Burton cites *Estelle v. Williams*, 425 U.S. 501 (1976), in which the Supreme Court held that compelling prisoners to wear prison clothing during jury trials violated prisoners' due process rights because of the impact on defendants' presumption of innocence. However, the conduct in this case does not rise to the level of a due process violation as described in *Estelle*. First, the effect of Harris's passing use of the euphemism "bull pen" on Burton's presumption of innocence is considerably less than the negative impact of a defendant being

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[4] The prosecutor appears to be referring to the portion of Michigan Rule of Evidence 609 which permits the introduction of evidence that a witness has been convicted of a crime for the purpose of "attacking the credibility of a witness" if the crime contained an element of theft, the crime was punishable by imprisonment in excess of one year, and the court determines that the evidence has significant probative value on the issue of credibility that outweighs its prejudicial effect. *See* Mich. R. Evid. 609(a)(2).

dressed in prison attire throughout the entirety of his or her trial. Even assuming the jurors understood the meaning of the term "bull pen," any negative effect was mitigated by Harris's testimony being halted as soon as he used the term, and the court and counsel's repeated instructions to the jury regarding the prosecution's burden of proof and Burton's presumption of innocence. Furthermore, Harris's testimony did not refer specifically to Burton being previously convicted of a crime, and indeed probably related to Burton's confinement prior to conviction. *See* Black's Law Dictionary (8th ed. 2004) (defining "bullpen" as "1. An area in a prison where inmates are kept in close confinement. 2. A detention cell where prisoners are held until they are brought into court."). The record indicates that the jury would have been aware of Burton being held in police custody as a result of the testimony of Dennis Michael Shaw (to which defense counsel did not object) that Shaw "took custody" of Burton in Detroit. Tr. Trans. Vol. III at 542 (Test. of Dennis Michael Shaw). Jurors in a criminal case, even in the absence of a statement regarding the defendant's custodial detention during trial, are likely to presume that a criminal defendant, irrespective of his or her guilt or innocence, has spent at least some time in custody as a result of being charged with a crime, particularly one such as murder. Thus, it does not appear
that the prosecution's eliciting of a passing reference to Burton's pre-trial incarceration impacted Burton's right to a presumption of innocence or was so fundamentally unfair as to require reversal of Burton's conviction. Because an objectively reasonable attorney could decide not to press this issue on appeal, and Burton has not shown a reasonable probability that his conviction would have been overturned if the issue had been raised, Burton has failed to demonstrate that his counsel on direct appeal was so constitutionally ineffective as to establish cause for excusing procedural default.

3. Jury Instruction Regarding Flight

Burton's third procedurally defaulted claim is that his counsel on direct appeal was constitutionally ineffective in failing to appeal

the trial judge's instruction to the jury regarding flight:

> Now, there's been some evidence that this defendant tried to run away or tried to hide or did run away or did hide after these alleged events. And even after he was accused of this crime and in this case. Now, this evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true. And if true, whether it shows that this defendant had a guilty state of mind.

Trial Tr. Vol IV. at 58.[5] Because the jury instruction directed jurors to make their own determinations as to whether Burton did in fact flee and if so, what state of mind such flight evinced, the trial judge's instruction regarding flight was not so prejudicial as to render the entire trial fundamentally unfair. *See Mitzel v. Tate*, 267 F.3d 524, 536 (6th Cir. 2001), *cert. denied*, 535 U.S. 966 (2002) ("[T]o warrant habeas relief [i.e., to state a constitutional due process claim] because of incorrect jury instructions, Petitioner

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[5] This instruction is substantively identical to the Michigan pattern jury instruction regarding flight. *See* 1 Mich. Crim. Jury Instructions 4.4 Flight, Concealment, Escape or Attempted Escape (2d ed. 2003 & 2003/2004 Supp.) ("(1) There has been some evidence that the defendant [tried to run away / tried to hide / ran away / hid] after [the alleged crime / (he / she) was accused of the crime / the police arrested (him / her) / the police tried to arrest (him / her)]. (2) This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt. (3) You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.").

must show that the instructions, as a whole, were so infirm that they rendered the entire trial fundamentally unfair. Allegations of 'trial error' raised in challenges to jury instructions are also reviewed under *Brecht's* harmless error standard.") (internal quotation marks and citations omitted). Moreover, the trial judge's decision to include an instruction regarding flight does seem to be based on evidence adduced at trial. Trial Tr. Vol. II at 413-14 (Test. of Jackie Robinson Harris) (noting Burton's statement that he planned to leave Lansing after a television news report identified Burton as a suspect in McClayton's murder). Thus, Burton's counsel on appeal could have reasoned that this argument lacked merit, and Burton has failed to show a reasonable probability that his conviction would have been reversed if this argument had been raised on direct appeal. As a result, Burton has not demonstrated constitutionally ineffective assistance of appellate counsel as cause to excuse procedural default.

4. Jury Instruction Omitting Element Of Murder

Burton's fourth procedurally defaulted claim is that his conviction should be reversed on the basis that the trial judge omitted an element of the crime of murder in his instructions to the jury. Specifically, Burton challenges the omission of an instruction that, in order to prove that Burton committed murder, the prosecution must show beyond a reasonable doubt the absence of justification or excuse. *See Gall v. Parker*, 231 F.3d 265, 287 n.4 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001) (noting the complexity of cases where "an ingredient can arguably be both an element of a charged crime and of a defense, or the presence of a defense can arguably negate a required element").

Michigan case law at the time of Burton's trial did list absence of mitigation or justification as one of the elements of murder. *See People v. Bailey*, 549 N.W.2d 325, 331 (Mich. 1996) ("The elements of second-degree, or common-law, murder are '. . . (3) absent circumstances of justification, excuse, or mitigation. . . .'") (quoting *People v. Dykhouse*, 345 N.W.2d 150, 158 (Mich. 1984)). However, the Michigan Supreme Court had also stated that

"[t]he absence of mitigating circumstances need not be established in order to convict one of first- or second-degree murder" in ruling that voluntary manslaughter (which required a showing of provocation) was not automatically a lesser included offense of murder.[6] *People v. Van Wyck*, 262 N.W.2d 638, 640 (Mich. 1978); *see also Berrier v. Egeler*, 583 F.2d 515, 521 (6th Cir.), *cert. denied*, 439 U.S. 955 (1978) (ruling that failure to include in jury instruction that burden of proof is upon the prosecution to disprove self-defense theory asserted by defendant violated defendant's federal due process rights, explaining that, "[i]n Michigan an element of proof of murder is evidence which negates self-defense, *in any case where self-defense is claimed and evidence is offered thereon*") (emphasis added). Indeed, the Michigan pattern jury instructions for first-degree and second-degree murder at the time of Burton's trial specifically noted that an instruction regarding the element of absence of justification or mitigation was not required if no such evidence had been proferred during trial. *See* 2 Mich. Crim. Jury Instructions 16.1 First-degree Premeditated Murder n.4 & Commentary (2d ed. 2003 & 2003/2004 Supp.) ("Paragraph (6) [i.e., 'that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime'] may be omitted if there is no evidence of justification or excuse, and the jury is not being instructed on manslaughter or any offense less than manslaughter. . . . Using traditional state of mind formulations based on 'malice aforethought,' some cases had implied that justification, excuse, and mitigation were 'negative elements' of murder, which the prosecutor had to disprove. However, the weight of Michigan authority is that justification, excuse, and mitigation need not be disproved by the prosecutor in every case. The absence of mitigating circumstances need not be established in order to convict one of first- or second-degree murder. With this in mind, the committee bracketed paragraphs on justification, excuse,

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[6] *Van Wyck*'s ruling that manslaughter is not a lesser included offense of murder was only recently overruled by the Michigan Supreme Court in *People v. Mendoza*, 664 N.W.2d 685, 696 (Mich. 2003).

and mitigation for use in appropriate cases. Of course, when a defense of self-defense, accident, or provocation is raised by the evidence, the prosecutor is required to disprove the defense beyond a reasonable doubt and the trial court is obliged to give the appropriate bracketed language.") (internal quotation marks and citations omitted); 2 Mich. Crim. Jury Instructions 16.5 Second-degree Murder n.4 (2d ed. 2003 & 2003/2004 Supp.); 2 Mich. Crim. Jury Instructions 16.6 Element Chart — First-degree Premeditated and Second-degree Murder n.* (2d ed. 2003, 1995/1996 Supp., & 2003/2004 Supp.).

Burton's principal defense at trial was that he had been mistakenly identified as the person who shot McClayton. Because Burton claimed not to have shot McClayton, the issue of justification or mitigation simply did not apply, and an instruction on these issues was not required under Michigan law. Trial Tr. Vol. IV at 39, 44-45. Furthermore, because justification or mitigation do not seem to have been at issue during the trial, any jury-instruction error on this point did not render Burton's trial so fundamentally unfair as to state a constitutional due process claim cognizable on habeas corpus review. In sum, a constitutional claim based on the absence of an instruction regarding mitigation or justification in this case lacks merit, so it cannot be said that failure to raise such an objection on appeal constituted ineffective assistance of appellate counsel that overcomes procedural default.

5. Prosecutorial Statements Regarding Jury's Duty To Convict And Defense Counsel's Failure To State That Defendant Is Not Guilty

Burton's fifth procedurally defaulted claim is that the prosecutor engaged in misconduct by making statements undermining Burton's presumption of innocence. Prosecutorial misconduct, in order to rise to the level of a constitutional due process violation, must be so severe that the defendant did not have a fair trial. As we explained in *Bowling v. Parker*, for prosecutorial misconduct to rise to the level of a constitutional violation cognizable on habeas review:

> the misconduct must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. Even if the prosecutor's conduct was improper or even universally condemned, we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial.

344 F.3d 487, 512-13 (6th Cir. 2003) (internal quotation marks and citations omitted).

a. Duty To Convict

Burton first challenges statements of the prosecutor during voir dire on the basis that such statements impermissibly instructed jurors that they had a duty to convict Burton; that is, that the prosecutor, in effect, directed the jury to enter a verdict against Burton. However, a review of the prosecutor's statements reveals that they were not improper because they did not amount to an instruction to the jury that it must convict Burton irrespective of its own assessment of the evidence presented during trial. Rather, the prosecutor's statements were part of a line of questioning directed at determining whether jurors understood that, if the *jurors* determined that the prosecution had proven beyond a reasonable doubt that Burton had committed murder, then they would be under a duty to convict Burton:

> [D]o you understand at the conclusion of the case, if the evidence shows that the defendant is guilty of the crime of murder, it'd be your duty as jurors to come back with a guilty verdict. Do you understand that? . . .
>
> If the proofs show you beyond a reasonable doubt that this man, Kumal Burton, committed murder, it'd be your duty to convict him. Do you understand that? If the evidence was there. It's the way our system works.
>
> If the evidence shows beyond a reasonable doubt that Kumal Burton committed murder on June 3rd, 1994, would each of you be able to stand up in this courtroom and face him and tell him that you are convicting him of murder?

Trial Tr. Vol. I at 28. Such questioning is not improper during the impaneling of a jury. *See United States v. Hill*, 738 F.2d 152, 154 (6th Cir. 1984) ("Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'") (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)); *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973) ("The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. It follows, then, that a requested question should be asked if an anticipated response would afford the basis for a challenge for cause.") (citations omitted). Moreover, the prosecutor specifically noted during voir dire that the jury would have a duty to find Burton not guilty if the prosecution failed to meet its burden of proof. Trial Tr. Vol. I at 49-50 ("And obviously, as [defense counsel] has indicated here, if the People don't prove guilty

beyond a reasonable doubt on all the elements, it would be your duty as jurors to find the defendant not guilty. Do you understand that?"). Given that Burton's claim of unconstitutional prosecutorial misconduct based on the prosecutor's alleged statement that the jury had a duty to convict Burton lacks merit, Burton's counsel on direct appeal was reasonable in choosing not to raise this argument on direct appeal, and no showing of ineffective assistance of appellate counsel can be made. Thus, this claim remains procedurally defaulted.

b. Prosecutorial Comments On Defense Counsel's Failure To State That Defendant Is Not Guilty

Burton's second allegation of prosecutorial misconduct stems from the prosecutor's statement during closing argument that, "I did not hear [defense counsel] say that his client was not guilty. He did not say that." Trial Tr. Vol. IV at 30 (quoted in J.A. at 68) (Br. in Support of Pet. for Habeas Corpus at 45). Burton asserts that such a comment constitutes prosecutorial misconduct because it runs counter to the presumption of innocence and the prosecution's burden to prove its case beyond a reasonable doubt.

While the prosecutor's statement was improper, it did not render Burton's trial so fundamentally unfair that a constitutional violation mandating reversal of conviction occurred. The prosecutor, defense counsel, and the court repeatedly noted Burton's presumption of innocence. Trial Tr. Vol. I at 49 (during voir dire, prosecutor's statement that, "because the state of Michigan — I represent the state of Michigan — the People of the state of Michigan, the burden, as [defense counsel] has suggested, is on my shoulders to prove guilt in this courtroom. And I accept that burden. That's the burden that the law imposes. But that doesn't mean that I have to come into the courtroom on criminal cases and prove guilt beyond all doubt. . . . And obviously, as [defense counsel] has indicated here, if the People don't prove guilty beyond a reasonable doubt on all the elements, it would be your duty as jurors to find the defendant not guilty."); Trial Tr.

Vol. I at 81 (judge's charge to jury at opening of trial regarding presumption of innocence); Trial Tr. Vol. I at 109 (defense counsel's statement during opening remarks to the jury that, "[A]s we talked earlier during the voir dire, the burden is on the prosecutor throughout this trial to prove his allegations beyond a reasonable doubt. And that burden does not shift at any point in time to the defendant. And so as we discussed during the voir dire, since that's true, the burden never shifts — the defendant has no obligation and need not present any witnesses. Need not even take the stand and testify. Because throughout this process, until such time as the Judge gives you the instructions and sends you into that room to deliberate over what you heard, the defendant is cloaked with a presumption of innocence and the burden to change that resumption of innocence, remains firmly upon the prosecutor's shoulders. . . . And that's very important today, because I will tell you right now, Kumal Burton is not going to take the witness stand. And, in fact, we will present no witnesses."); Trial Tr. Vol. IV at 54 (judge's instruction to jury at close of trial that, "a person accused of a crime is presumed to be innocent. This means that you must start with the presumption that this defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.").

In view of the repeated references to the presumption of Burton's innocence during the course of the trial, it cannot be said that the prosecutor's single (albeit improper) remark during closing arguments rendered Burton's trial as a whole fundamentally unfair. *See Roe v. Baker*, 316 F.3d 557, 566 (6th Cir. 2002), *cert. denied*, 124 S. Ct. 140 (2003) ("[T]he government does not argue that such comments were appropriate, but they were limited, isolated and mitigated when the court gave the jury appropriate instructions, which would have cured any misperception that the jury might have received from the prosecutor's arguments. We agree. Moreover, such passing comments did not render the sentencing phase fundamentally unfair."); *see also Gravley v. Mills*, 87 F.3d 779, 789 (6th Cir. 1996) (explaining that, with regard to prosecutorial comments regarding a defendant's post-arrest

silence, a habeas petitioner "must establish that the error had a 'substantial and injurious effect or influence in determining the jury's verdict'") (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Because establishing a claim for unconstitutional prosecutorial misconduct on the facts of the case at bar is difficult at best, counsel on direct appeal could have reasonably decided not to raise this claim. Hence, the failure of Burton's counsel to raise this objection on direct appeal does not rise to the level of constitutionally ineffective assistance of appellate counsel necessary to establish cause to excuse procedural default.

In sum, the failure of Burton's counsel on direct appeal to raise Burton's various procedurally defaulted claims does not rise to the level of constitutionally ineffective assistance of counsel necessary to overcome procedural default because none of Burton's claims seem meritorious. Because Burton is unable to prove cause via ineffective assistance of appellate counsel, an analysis of the prejudice prong of the "cause and prejudice" inquiry is not required. Thus, we conclude that the district court did not err in denying Burton's petition for a writ of habeas corpus with respect to the procedurally defaulted claims.[7]

III. CONCLUSION

Burton has failed to establish that the Michigan courts' denial of his claim of right to counsel of choice was contrary to or an unreasonable application of clearly established federal law. Burton also has not shown that his counsel on direct appeal was so

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[7] Because we have concluded, in determining that Burton's counsel on direct appeal was not constitutionally ineffective, that all of the claims he asserts on habeas review lack merit, we see no basis upon which a writ of habeas corpus can issue. Thus, we need not address Burton's argument that the district court erred in finding that all but one of his claims had been procedurally defaulted.

constitutionally ineffective as to establish the cause and prejudice necessary to permit a federal court to review claims procedurally defaulted at the state level. Consequently, we **AFFIRM** the district court's denial of Burton's petition for a writ of habeas corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KUMAL BURTON,

Petitioner,

v. Case No. 01-10287-BC

Hon. David M. Lawson

PAUL RENICO,

Respondent.

_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Kumal Burton, a state inmate presently incarcerated in the Carson City Correctional Facility in Carson City, Michigan, has filed an application for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The habeas petition attacks the petitioner's state court conviction for murder and possession of a firearm during the commission of a felony (felony firearm"). The Court concludes that the grounds asserted lack merit and that the petition must be dismissed.

I.

On May 26,1995, a circuit court jury in Ingham County, Michigan found the petitioner guilty of first-degree murder, Mich. Comp. Laws § 750.316, and felony firearm, Mich. Comp. Laws § 750.227b. The convictions arose from the fatal shooting of Sherman McClayton in the parking lot of a bar in Lansing, Michigan.

At trial, the prosecution presented evidence that, a little before 2:00 a.m. on June 3, 1994, the petitioner told an acquaintance at a residence on West Lapeer Street in Lansing that he was about to kill Sherman. Then he went in the kitchen, acquired a gun, and left the residence. Eyewitnesses at the Black and Tan Bar testified that Sherman McClayton and the petitioner
argued and scowled at each other on the night of June 3,1994. McClayton told the petitioner, who was a Detroit resident, that he did not like people from Detroit. Later, while McClayton was talking to someone else in the parking lot of the bar, the petitioner stepped out of a car, walked up to McClayton, pulled a gun from his pocket, and shot him. The petitioner continued to shoot after McClayton fell to the ground. Then he got back in his car, which was still running, and drove away. Upon learning that McClayton did not die immediately, the petitioner said, "I should have killed him."

Back at the residence on West Lapeer Street, the petitioner asked his acquaintance to take the gun, which was hot and smelled of smoke. The petitioner said that he had killed someone. He knew the police were looking for him, but he said that they did not have anything on him.

The following September, a news broadcaster announced that the petitioner was the trigger man in the incident. When the petitioner heard the announcement, he got up, grabbed a key, and left, saying, "I'm out of here." Later that night, he said that he was returning to Detroit.

The petitioner was apprehended and charged with the murder of Sherman McClayton. The petitioner did not testify at trial, nor did he present any witnesses in his defense. The jury convicted him as charged.

The trial court sentenced the petitioner to two years in prison for the felony firearm conviction, followed by life imprisonment without the possibility of parole for the murder conviction. His convictions were affirmed on appeal.

On August 3, 2001, the petitioner filed his habeas corpus petition through counsel. He alleges the following seven substantive claims:

1. Petitioner was denied the right to retain counsel of his choice by rulings of the circuit court denying a reasonable adjournment.

2. The prosecutor and trial court denied petitioner a fair trial by admitting other bad acts not attributable to petitioner through evidence.

3. The prosecutor and trial court denied petitioner a fair trial by admitting testimony about petitioner being in jail.

4. Petitioner was denied a fair trial by irrelevant and prejudicial instructions on flight.

5. Petitioner was denied a fair trial by instructions that omitted elements of the crime and tended to shift the burden of proof.

6. The prosecutor denied petitioner a fair trial by arguing the jury's so-called 'duty to convict,' and by arguing the failure of defense counsel to declare to the jury that petitioner was not guilty.

7. Petitioner had ineffective assistance of appellate counsel.

The petition also raises an eighth "claim" which does not allege a substantive error, but instead alleges that the other issues are properly raised in a habeas corpus proceeding despite the petitioner's failure to object at trial or to raise the claims on direct review.

The petitioner raised his first habeas claim on direct appeal. The Michigan Court of Appeals affirmed the petitioner's conviction in an unpublished *per curiam* opinion. *People v. Burton,* No. 187771 (Mich. Ct. App. Aug. 22, 1997). The Michigan Supreme Court denied leave to appeal because it was not persuaded that the questions presented should be reviewed. *People v. Burton,* No. 110691 (Mich. July 28, 1998).

The petitioner raised his remaining habeas claims in a motion for relief from judgment filed on July 23,1999. The trial court denied the motion after determining that each of the grounds for relief could have been raised on appeal and that the claims had no merit. The Michigan Court of Appeals denied leave to appeal the trial court's decision, stating that the petitioner had failed "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Burton,* No., 228324 (Mich. Ct. App. Jan. 18, 2001). The Michigan Supreme Court likewise denied leave to appeal for failure "to meet the burden of establishing entitlement to relief under MCR. 6.508(D)." *People v. Burton,* No. 118940 (Mich. July 30, 2001).

The respondent contends in a responsive pleading that the petitioner's habeas claims are meritless and procedurally defaulted.

II.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,110 Stat. 1214 (AEDPA), altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the Act, April 24,1996. *Lindh v. Murphy,* 521 U.S. 320,336 (1997). Because the petitioner's application was filed after April 24,1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis,* 144 F.3d 429, 433 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(l) "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct."); *see also Cremeans v. Chapleau,* 62 F.3d 167,169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous.").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases....

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405, 406 (2000).

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 365, 410, 411. *See also Lewis v. Wilkinson*, No. 02-0350, 2002 WL 31235052, at *3-4 (6th Cir. Oct. 7, 2002).

The first habeas claim, to which there has been no procedural challenge lodged, alleges that the trial court deprived the

petitioner of his right to retain counsel of choice by denying his request for an adjournment of the trial date. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This constitutional right is applicable to the states through the Fourteenth Amendment. *Serra v. Michigan Dep 't ofCorrs.*, 4 F.3d 1348,1351 (6th Cir. 1993) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963)).

"A criminal defendant who desires and is financially able to retain his own counsel 'should be afforded a fair opportunity to secure counsel of his own choice.'" *Ibid.* (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)). However,

> [n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. *See Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970). Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

Morris v. Slappy, 461 U.S. 1, 11-12 (1983).

The petitioner was represented by court-appointed attorney George Zulakis at the preliminary examination held in December 1994. On January 20, 1995, Judge Carolyn Stell set a trial date of

February 27, 1995, and the petitioner retained attorney Thomas Warshaw to represent him. On February 21, 1995, attorney Warshaw moved to adjourn the trial date.

At a hearing in the petitioner's absence on February 22, 1995, Warshaw stated that he was scheduled to start another trial on the following day. He had received discovery materials in the petitioner's case two days earlier, which he described as "quite voluminous," and he said that he anticipated filing some motions. He offered to try the case on March 13 or March 27. The prosecutor indicated that the week of March 13 would be a hardship for two important prosecution witnesses. Tr. 2/22/1995 at 4-7.

Judge Stell stated that a civil case was scheduled for trial during the week of March 27 and that the parties in the civil case had waited a year for a trial date. She noted that the petitioner was arraigned on December 28, 1994, but apparently waited to retain counsel until January 25, 1995. Judge Stell said that, although the petitioner had the right to retain counsel, he should not be able to manipulate the trial court's schedule by acquiring new counsel at the last minute. The court denied defense counsel's motion to adjourn the trial date after stating that it was the first case on her docket and that Warshaw, who was a very skilled attorney, should be able to prepare adequately for trial in five days. At that point in the proceeding, Warshaw moved to withdraw as counsel for the petitioner, and Judge Stell granted his motion. *Id.* at 5-9.

An order substituting counsel was not entered on the docket before the trial date of February 27,1995. Consequently, the prosecutor asked for a hearing to clarify the petitioner's representation. Judge Stell did not grant the prosecutor's request; instead, she appointed attorney Joe Brehler to represent the petitioner. Judge Stell subsequently disqualified herself, and the case was assigned to Judge William Collette.

On May 11, 1995, Judge Collette held a hearing on the prosecutor's motion to clarify the petitioner's representation.

Attorney Warshaw stated at the hearing that he did not want to, and could not, represent the petitioner. He said that communication between the petitioner and himself had been adversely affected to the point that he could not give the petitioner fair representation. Judge Collette offered to adjourn the new trial date (May 22, 1995) and to let the petitioner retain other counsel. The petitioner responded that, although his family had retained Warshaw, he personally could not afford to retain counsel. Moreover, his relationship with Warshaw apparently had deteriorated, and he stated that he liked Brehler, he wanted Brehler to represent him, and he had no other choice. Judge Collette then ruled that the trial would proceed, as scheduled, on May 22, 1995. Tr. 5/11/1995 at 6-13.

On review, the Michigan Court of Appeals held that Judge Stell abused her discretion in failing to grant a continuance. However, the court also observed that, although a defendant generally need not demonstrate prejudice when his Sixth Amendment right to counsel of choice was violated, no reversal was required in this case. The court of appeals noted that a different judge provided the petitioner with the option of adjourning trial and retaining other counsel. The court of appeals further observed that the petitioner had declined the offer, stated his satisfaction with appointed counsel, and declined to exercise the very right he claimed he was denied.

This Court finds that the state appellate court's conclusion was objectively reasonable. Attorney Warshaw apparently agreed to represent the petitioner, knowing that the trial date was five weeks later. He did not move for an adjournment until the week before the trial date. Judge Stell opined that Mr. Warshaw was a skilled attorney and that he could prepare adequately for trial. Judge Stell apparently believed that Warshaw was attempting to manipulate the court into granting an adjournment. The refusal to grant an adjournment may have been the trial judge's way of foiling that attempt and asserting her authority.

But even if Judge Stell's refusal to adjourn the trial was &quotan unreasoning and arbitrary insistence upon

expeditiousness," Judge Collette, who ultimately tried the case, afforded the petitioner his right to retain counsel of choice. Judge Collette also offered to adjourn the trial date. The petitioner essentially abandoned his present claim when he was given an opportunity to retain counsel of choice. Moreover, he was not entitled to insist on representation by an attorney he could not afford. *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624 (1989). If the Court were to grant the petitioner a new trial on his Sixth Amendment claim, it could not offer him any greater opportunity than was afforded him by Judge Collette.

"[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor,* 529 U.S. 362, 411 (2000). The state appellate court's decision was not contrary to, or an unreasonable application of. Supreme Court decisions on the right to retain counsel of choice. Accordingly, the petitioner has no right to habeas relief on the basis of his first claim. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor,* 529 U.S. at 412-13.

III.

The petitioner's remaining substantive claims involve evidentiary issues, the jury instructions, the prosecutor's closing argument, and the ineffective assistance of appellate counsel. The respondent argues that the state court rejected the claims regarding the evidence, the jury instructions, and the prosecutor on the ground that the petitioner defaulted on a state procedure, that this procedural default constitutes an adequate and independent basis for the state courts' decision, and that the quality of appellate counsel's representation did not amount to "cause" for the procedural default.

The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Colemanv. Thompson, 501 U.S. 722,750 (1991). Such a default may occur if the state prisoner files an untimely appeal, *Coleman,* 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so. *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. *United States v. Frady,* 456 U.S. 152,167-69 (1982); *Simpson v. Sparkman,* 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." *Rust,* 17 F.3d at 162; *see Murray v. Carrier,* 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. *Williams v. Coyle,* 260 F.3d 684, 693 (6th Cir. 2001), *cert. denied,* 122 S. Ct. 2635 (2002); *Warner v. United States,* 975 F.2d 1207,1213-14 (6th Cir. 1992). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. *Coleman,* 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground [] only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." *Simpson,* 94 F.3d at 202. Whether the independent state ground is

adequate to support the judgment is itself a federal question. *Lee v. Kemna,* 534 U.S. 362, 375 (2002).

If the last state court from which the petitioner sought review affirmed the conviction both on the merits and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. *Rust,* 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991).

A.

The petitioner's remaining claims were not raised in the state courts on direct appeal, but rather on collateral review. The last state court from which the petitioner sought review, the Michigan Supreme Court, denied relief in a standard order "for failure to establish entitlement to relief under M.C.R. 6.508(D)." *Burton,* No. 110691. In fact, all three state courts referenced the procedural rule on collateral review of the petitioner's convictions. The trial court cited Rule 6.508(D)(3) in its opinion and stated that "[e]ach of the grounds claimed by the Defendant could have easily been raised in the prior appeal filed on behalf of this Defendant." *People Burton,* No. 94-68306-FC (Ingham County Cir. Ct. Nov. 22, 1999). The Michigan Court of Appeals and the Michigan Supreme Court enforced the rule by stating that the petitioner had failed to establish entitlement to relief under Rule 6.508(D).

The text of Mich. Ct. R. 6.508(D) states:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other thanjurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
(a) good cause for failure to raise such grounds on appeal or in the prior motion, and (b) actual prejudice from the alleged irregularities that support the claim for relief.
As used in this subrule, "actual prejudice" means that,
(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
(iv) in the case of a challenge to the sentence, the sentence is invalid. The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

This clearly is a rule of procedure intended to mimic the federal "cause and prejudice" test. *See Wainwright v. Sykes,* 433 U.S. 72, 87 (1977).

In *Simpson v. Jones,* 238 F.3d 399 (6th Cir. 2000), the Sixth Circuit held that a statement by the Michigan Supreme Court that a defendant "failed to 'meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)'" constituted invocation of "an independent and adequate state procedural rule" sufficient to "prevent[] federal habeas review." *Id.* at 407-08. In that case, the petitioner filed two motions for collateral review in the state court following his direct appeal. The trial court granted partial relief on the first and the petitioner never appealed the adverse portion of that ruling. The state trial judge denied the second motion on the basis of Mich. Ct. R. 6.508(D) alone and did not address the merits of those claims. The state supreme court's order denying leave to appeal, albeit a form order, was responsive to the issue addressed by the lower court. A similar result occurred in *Burroughs v. Makowski,* 282F.3d410 (6th Cir. 2002), in which the state trial court denied post-conviction relief both on the merits and on the ground of procedural default. *Id* at 413-14.

The petitioner alleges that Rule 6.508 was not an independent basis for the state court's decision because it was modeled after the federal procedural default doctrine. The Supreme Court recently explained, however, that a state procedural rule is only dependent on federal law when its application requires, and the state court conducts, an analysis of the federal constitutional merits of the petition. *See Stewart v. Smith,* 122 S. Ct. 2578, 2582 (2002). Otherwise, it is independent of federal law. *Id.* The trial court and state appellate courts in this case denied relief on the basis of Rule 6.508(D), in essence affirming the trial court's ruling in that respect, and a state court's reliance on Rule 6.508(D) in those circumstances "presents a sufficient explanation that [its] rulings were based on procedural default." *Burroughs,* 282 F.3d at 414. The fact that the trial court also found no merit in the claims does not preclude this Court from determining that the petitioner's claims are procedurally defaulted. *Harris v. Reed,* 489 U.S. 255,264 n.10 (1989); *Paprocki v. Foltz,* 869 F.2d 281,284-85 (6th Cir. 1989).

B.

Since the petitioner did not abide by the state procedural rules, he must show "cause" for his procedural default and resulting prejudice, or that failure to review his claims will result in a miscarriage of justice. *Coleman v. Thompson,* 501 U.S. at 749-50. The petitioner alleges that his appellate counsel's defective performance was "cause" for not raising his claims on direct review.

Constitutionally ineffective assistance of counsel is "cause" for a state procedural default. *Murray v. Carrier,* 477 U.S. 478, 488 (1986). However, the petitioner had no absolute right to compel his attorney to make every nonfrivolous argument on appeal. *Evitts v. Lucey,* 469 U.S. 387, 394 (1985) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the appeal. *Strickland v. Washington,* 466 U.S. 668,687 (1984); *Carpenter v. Mohr,* 163 F.3d 938,946 (6th Cir. 1998), *rev 'don other grounds,* 529 U.S. 446 (2000). The Court will briefly evaluate the petitioner's defaulted claims to determine whether appellate counsel rendered ineffective assistance by failing to raise the claims on direct review.

1.

The second and third habeas claims raise evidentiary issues. The second claim alleges that the petitioner was denied a fair trial by the admission of "other acts" evidence. The disputed evidence consisted of testimony that (1) a prosecution witness initially did not contact the police because she was threatened and (2) the petitioner kept a gun in a "safe" house. The introduction of similar acts evidence, however, is not repugnant to the Constitution unless its admission violates fundamental conceptions of justice. *See Dowling v. United States,* 493 U.S. 342, 352-54 (1990). Such a finding is unlikely when the evidence is circumstantially related to the crime charged. *Id.* at 353. Both intimidation of a prosecution witness and storage of a potential murder weapon are at least

arguably circumstantially related to a charge of first-degree murder. Furthermore, the evidence against the petitioner was so overwhelming that the "other acts" evidence no doubt was harmless.

The third habeas claim alleges that the petitioner was deprived of a fair trial by a witness's testimony that the petitioner had been confined in jail with him. This evidence likely did not prejudice the petitioner because the jurors were informed that the petitioner was arrested in December of 1994. Tr. 5/25/95 at 542. The additional testimony of a witness that the petitioner was in jail with him is largely cumulative, and certainly not enough to overcome the overwhelming evidence of the petitioner's guilt.

Although these issues were not frivolous, the choice of appellate counsel not to raise them in favor of concentrating on the right-to-counsel issue on direct appeal is a strategic choice that does not fall below the level of competence in a constitutional sense. *See Strickland,* 466 U.S. at 687.

2.

The fourth claim alleges that the trial court should not have instructed the jurors on flight because there was no evidence that the petitioner left Lansing for his hometown of Detroit immediately after the shooting. Defense counsel stated at trial that the testimony was ambivalent on the matter of flight. The trial court responded:

> I have never seen a more classic case of flight in my entire, career in someone who shoots someone at the scene, leaves, goes back, hides the weapon supposedly, leaves, goes somewhere else, tells someone else they're going out of town, leaves town. Then is questioned by the police, gives a false name, doesn't even - and knows that they're looking for him , gives false information, and continues on about this, goes to Detroit, hides out for months. If that's not a classic case of flight and concealment, I'm not clear what it is. But be [that] as it may, if this isn't flight and concealment, I'm sure the higher

> courts will let me know.
>
> But this instruction is rather neutral, in any event. And certainly that type of thing can be treated in a number of different ways. And the instruction doesn't hurt, but I think, that [the prosecutor's] entitled to it.

Tr. 5/26/95 at 10.

> The trial court subsequently instructed the jury as follows:
>
> Now, there's been some evidence that this defendant tried to run away or tried to hide or did run away or did hide after these alleged events. And even after he was accused of this crime and in this case. Now, this evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true. And if true, whether it shows that this defendant had a guilty state of mind.

Tr. 5/26/95 at 58.

Under state law, a jury instruction on flight and concealment is appropriate if the record evidence warrants it. *People v. Johnson*, 171 Mich. App. 801, 804, 430 N.W.2d 828, 829 (1988). The instruction, however, may only advise the jury of permissible inferences it may draw, and may not compel the jury to reach a conclusion of guilt. *See Sandstrom v. Minnesota,* 442 U.S. 510, 514- 15 (1979). The record in this case clearly contained evidence that supported a flight instruction, as accurately summarized by the trial judge. Moreover, the trial court clearly stated that evidence of flight does not prove guilt and that the jury had to determine the facts. Appellate counsel's decision to omit this issue from the direct appeal was not constitutionally deficient.

Claim number five alleges that the absence of a jury instruction on justification, excuse, or mitigation deprived the petitioner of a fair trial and shifted the burden of proof by requiring the petitioner to prove that the murder was justified, excused, or mitigated by some circumstance. In Michigan, "juries can convict of murder only when they are convinced beyond a reasonable doubt that (1) the defendant intended (actually or impliedly) to kill and (2) circumstances of justification, excuse or mitigation do *not* exist." *People v. Morrin,* 31 Mich. App. 301,323,187 N.W.2d 434,445 (1971). However, the prosecutor need not prove the absence of mitigating circumstances or provocation for the jury to convict someone of first- or second-degree murder. *People v. Van Wyck,* 402 Mich. 266,269,262 N.W.2d 638,640 (1978); *People v. Hopson,* 178 Mich. App. 406,410,444 N.W.2d 167,169 (1989).

The requisite intent for first-degree murder is the intent to kill, and the killing must be premeditated and deliberate. *People v. Schollaert,* 194 Mich. App. 158,170,486 N.W.2d 312,318 (1992). The mental state that the prosecutor must prove to establish second-degree murder is "the intent to kill, an intent to inflict great bodily harm, or the wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." *Hopson,* 178 Mich. App. at 410, 444 N.W.2d at 169. The trial court incorporated these principles in its charge to the jury. Tr. 5/26/95 at 63-64. The trial court also instructed the jury that the prosecutor carried the burden of proof and that the petitioner was not required to do anything. *Id.* at 54.

Even if the jury instructions violated due process, the Supreme Court has held that the harmless-error rule *of Chapman v. California,* 386 U.S. 18 (1967), applies to a trial court's refusal to instruct on an element of the offense. *Neder v. United States,* 527 U.S. 1,4 (1999). Witnesses to the murder testified that the petitioner and Sherman McClayton glared at each other and argued a short time before the shooting. Tr. 5/23/95 at 211-230, 389-99. Another witness testified that McClayton was shot five times and that all the bullets entered his body from the back. Tr. 5/23/95 at 445-61. In light of the overwhelming and uncontested evidence that the murder was not justified, excused, or mitigated, the jury

verdict most likely would have been the same if the trial court had instructed the jury on justification, excuse, or mitigation. Therefore, the alleged error was harmless. *Neder,* 527 U.S. at 17. In all events, appellate counsel's "failure" to raise this issue on direct appeal was not ineffective.

4.

The sixth claim alleges that the prosecutor deprived the petitioner of a fair trial by arguing that the jury had a duty to convict him if the evidence showed beyond a reasonable doubt that he was guilty of the charged crimes. The petitioner also alleges in this claim that the prosecutor shifted the burden of proof by commenting on defense counsel's failure to say that the petitioner was innocent.

The comment on the duty to convict was made during *voir dire,* not during the prosecutor's closing argument. Tr. 5/22/95 at 28, 50, 72. The comment about defense counsel not saying that the defendant was innocent was a response to defense counsel's closing argument, which hinted that witnesses had mistaken the petitioner for the shooter. The prosecutor purportedly stated in rebuttal:

> Is he suggesting to us, ladies and gentlemen, that we have the wrong person here on trial? Is that what he is saying to us? To find or come back with a verdict that's consistent with all the evidence, there wasn't any evidence of premeditation? We have talked a lot about first degree murder. *I did not hear him say that this client was not guilty. He did not say that.*

Tr. 5/26/96, at 46-47 (as quoted in the petitioner's brief, p. 45; page 47 of volume IV of the trial transcript is missing from the record before the Court).

"It is axiomatic that a defendant in a criminal trial need not testify or produce any evidence, and that a prosecutor may not comment on the absence of such." *United States v. Bond,* 22 F.3d 662, 669 (6th Cir. 1994). However, a prosecutor ordinarily is

"entitled to wide latitude in rebuttal argument and may fairly respond to arguments made by defense counsel." *Angel v. Overberg,* 682 F.2d 605, 607-08 (6th Cir. 1982) (citing *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974)).

The prosecutor's disputed comments did not deprive the petitioner of a fair trial because both the prosecutor and the trial court explained to the jurors that the prosecution was required to prove each element of the crimes and that the attorneys' arguments were not evidence. *See* Tr. 5/26/95 at 13,17-28, 54-56. The trial court instructed the jury that the defendant was presumed innocent, that the defendant was not required to prove his innocence or to do anything, and that the jurors should find the defendant not guilty unless they were satisfied beyond a reasonable doubt that the defendant was guilty. Trial Tr. 5/26/95 at 54-55. Moreover, the alleged prosecutorial misconduct was likely harmless in light of the overwhelming evidence against the petitioner. Appellate counsel's performance was not substandard in not raising this issue on direct appeal.

c.

The Court concludes for all the reasons given above that the petitioner's appellate attorney was not ineffective for failing to raise habeas claims II through VI in the appeal of right. Therefore, the petitioner has not established "cause" via ineffective assistance of appellate counsel. *Martin v. Mitchell,* 280 F.3d 594, 606 (6th Cir. 2002), *cert. denied,* 2002 WL 1579244 (Nov. 4, 2002). In other words, the petitioner has not shown that he received constitutionally ineffective assistance of appellate counsel. The alleged ineffectiveness does not excuse his procedural default. *Id,*

The Court need not determine if the petitioner was prejudiced by the alleged constitutional errors because he has not established "cause." *Smith v. Murray,* 477 U.S. 527,533 (1986). The only remaining question is whether a miscarriage of justice will occur if the Court declines to adjudicate claims II through VI on their merits.

The exception for miscarriages of justice requires showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schiup v. Delo,* 513 U.S. 298, 326-27 (1995); *Carrier,* 477 U.S. at 496. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614,623 (1998). "To be credible, [a claim of actual innocence] requires [the] petitioner to support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Schiup,* 513 U.S. at 324.

The petitioner has not shown that, in light of some new and reliable evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 329. Accordingly, a miscarriage of justice will not occur as a result of this Court's failure to adjudicate claims II through VI on the merits.

IV.

The petitioner has not established that he is presently in custody in violation of the Constitution or laws of the United States. The Michigan courts' decision rejecting his claim that he was denied counsel of his choice because the original trial judge denied his request for a trial adjournment was not contrary to or an unreasonable application of federal law as established by the Supreme Court. His remaining claims were procedurally defaulted, and he has not established cause for the default or actual innocence.

Accordingly, it is **ORDERED** that the petition for writ of habeas corpus is **DENIED.**

DAVID M. LAWSON
United States District Judge

Dated: November 12, 2002

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

NORTHERN DIVISION

KUMAL BURTON,

Petitioner,

v. Case No.01-10287-BC
Hon. David M. Lawson

PAUL RENICO,

Respondent.

_____/

JUDGMENT

In accordance with the Opinion and Order entered on this date,

It is **ORDERED AND ADJUDGED** that the Petition For Writ of Habeas Corpus is **DENIED** with prejudice.

/S/

DAVID M. LAWSON

United States District Judge

Dated: November 12, 2002

Order

Michigan Supreme Court
Lansing, Michigan

Entered: July 30, 2001

Maura D. Corrigan
Chief Justice

118940

Michael F. Cavanagh
Elizabeth Weaver
Marilyn Kelley
Clifford W. Taylor
Robert P. Young, Jr
Stephen J. Markman

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KUMAL JEROME BURTON,

SC: 118940
COA: 228324
Ingham CC: 94-068306-FC

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal from the January 18, 2001 decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing relief under MCR 6.508(D).

SEAL I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court certify that the foregoing is a true and complete copy of the order entered at the direction of the Court

July 30 , 2001 /s/Corbin R. Davis

Court of Appeals, State of Michigan
ORDER

People of Ml v Kumal Jerome Burton

Richard Allen Griffen

Presiding Judge

Docket No. 228324

Peter D. O'Connell

LC No. 94-068306-FC

Patrick M. Meter

This Court orderes that the motion for rehearing is DENIED.

The Court orders that the motion for leave to file amended delayed application for leave to appeal is DENIED as moot.

SEAL

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk on March 1, 2001

Court of Appeals, State of Michigan

ORDER

People of Ml v Kumal Jerome Burton	Richard Allen Griffen Presiding Judge
Docket No. 228324	Peter D. O'Connell
LC No. 94-068306-FC	Patrick M. Meter

The Court orders that the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL *A* true copy entered and certified by'Carl L. Gromck, Chief Clerk on January 18, 2001

STATE OF MICHIGAN

INGHAM COUNTY- CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

OPINION AND ORDER

Plaintiff,

File No: 94-68306-FC

v Hon. William E. Collette

KUMAL JEROME BURTON,

Defendant

The Defendant, Kumal Jerome Burton, was convicted of murder in the first degree by a jury and was sentenced co life in prison on June 28, 1995. Defendant appealed his conviccion, and it was affirmed by the Michigan Court of Appeals. Later, an application for leave to appeal to the Michigan Supreme Court was denied. Defendant now moves pursuant to MCR 6.502 for relief from judgment claiming that there were grave errors that were not previously raised by prior appellate counsel that denied him a fair trial.

Each of the grounds claimed by the Defendant could have easily been raised in the prior appeal filed on behalf of this Defendant. To merely state that prior counsel's failure to raise the points claimed somehow creates good cause would, in and of itself, obviate MCR 6.508 (D) (3).

In addition, the Court finds no merit to the claims as asserted by this Defendant. This Court, after a careful review

of the brief of the Defendant and the response filed by the prosecution, does not find-that there are any grounds for relief from judgment and, accordingly, the motion is denied. This opinion shall operate as an order ten days after the date hereof.

Dated: 11/29/99

WILLIAM E. COLLETTE
CIRCUIT JUDGE

Order

Michigan Supreme Court
Lansing, Michigan

Entered: July 28, 1998
110691

Conrad L. Mallett, Jr.
Chief Justice
James H. Brickiey
Michael F. Cavanagh

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Parricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford V. Taylor
Justices

v

KUMAL JEROME BURTON,

Defendant-Appellant.

SC: 110691
COA: 187771
LC: 94-068306-FC

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

SEAL I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction or" the Court.

July 28, 1998 /s/ Corbin R. Davis

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

August 22, 1997

Plaintiff-Appellee,

v

No.187771
Ingham Circuit Court
LC No. 94-068306-FC

KUMAL JEROME BURTON,

Defendant-Appellant.

Before: Hood, P.J., and McDonald and Young, JJ.
PER CURIAM.

Following a jury trial defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and sentenced to life in prison without the possibility of parole for the murder conviction and two years' imprisonment for the felony-firearm charge. Defendant now appeals as of right. We affirm.

Defendant first claims his convictions must be reversed because the trial court's refusal to grant a continuance to permit his retained counsel to prepare a defense for trial violated his right to counsel under both the federal and Michigan Constitutions. US Const, Am VI; Const 1963,. art 1, &sect20. Although we agree the trial court

abused its discretion in failing to grant defendant's request for a continuance, *People v Wilson,* 397 Mich 76; 243 NW2d 257 (1976), reversal is not mandated in this case. Generally, prejudice need not be demonstrated where a defendant is denied the Sixth Amendment right to counsel of the defendant's choice. See *People v Johnson,* 215 Mich App 658; 547 NW2d 65 (1996) and cases cited therein. However, here, shortly after denying the continuance, the trial judge disqualified herself and the matter was assigned to a different judge who provided defendant the option of adjourning trial to allow him the opportunity to obtain another retained counsel. Defendant declined the offer and stated his satisfaction with his appointed counsel. Thus defendant declined to exercise the very right he now claims he was denied. No reversal is required.

Defendant's remaining claims have no merit. The record does not support defendant's request' for instruction on the lesser offense of voluntary manslaughter, *People v Pouncey, 43* 7Mich 382; 471 NW2d 346 (1991), or reveal any evidence of prosecutorial misconduct resulting in a denial of defendant's right to a fair and impartial trial, and the jury array was not challenged before the jury was impaneled and sworn, *People v Hubbard (After Remand),* 217 Midi App 459;552 NW2d 593 (1996). Finally there were no errors the cumulative effect of which denied defendant a fair and balanced trial. *People v Spencer,* 130 Mich App 527; 343 NW2d 607 (1983).

Affirmed.

/s/Harold Hood

/s/ Gary R. McDonald

/s/Robert P. Young, Jr.